THE UNITED NATIONS AS A SOURCE OF DOMESTIC LAW: CAN SECURITY COUNCIL RESOLUTIONS BE ENFORCED IN AMERICAN COURTS?*

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Introduction

This article investigates the prospects for successful litigation in American[1] courts to influence United States foreign policy by forcing federal government compliance with United Nations Security Council resolutions. The feasibility of such an undertaking is evaluated through a study of the foremost such effort to date, the Namibian fur seal skins case.[2]

In recent years, United States foreign policy has often diverged from that of the majority of United Nations member states. The gap between the two has been particularly pronounced with respect to Southern Africa,[3] and a growing domestic movement has mirrored international opinion in demanding stronger United States support for self-determination in that region. Consequently, it was perhaps inevitable that legal challenges to the federal government's stance on Southern Africa would be brought.[4] The most important such challenge was *Diggs v. Dent*,[5] which attempted to block the importation of fur seal skins from Namibia (Southwest

1. Throughout this article, "American" refers to the "United States of America," not to the American continents.

2. Diggs v. Dent, No. 74-1292 (D.D.C., filed May 14, 1975), *reported in* 14 INT'L LEGAL MATERIALS 787 (1975), *aff'd sub nom.* Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976).

3. *See* pp. 246-50, 266-69 *infra;* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 9-15, 44, 164-66, 571, 721-23 (E. McDowell ed. 1976) [hereinafter cited as E. McDowell].

4. For example, in Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied,* 411 U.S. 931 (1973), plaintiffs unsuccessfully attacked the legality of the Byrd Amendment, which permitted the importation of chromium ore from Rhodesia in violation of the sanctions imposed on Rhodesia by the United Nations. *See* pp. 261-62 *infra.*

5. *See* note 2 *supra.*

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Africa)[6] on the grounds that such importation violated United Nations resolutions prohibiting actions which would imply recognition of or help to entrench South African control over Namibia. The legal theory underlying this suit was that the federal government's policies on South Africa, which were at variance with United Nations resolutions, violated United States treaty obligations under the United Nations Charter.

The issues in such litigation can be grouped under the following three questions: (1) Are there any jurisdictional or other threshold barriers in American courts to the assertion of claims based on United Nations resolutions? (2) Are particular United Nations resolutions binding as a matter of United States domestic law? (3) Have particular United Nations resolutions nevertheless been effectively nullified as a matter of United States domestic law by subsequent and inconsistent

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6. Namibia is the territory to the north of the Union of South Africa, lying on the Atlantic Ocean, and bordered by Angola on the north, Zambia on the northeast, and Botswana on the east. In 1884 it became the German colony of Southwest Africa. South African forces occupied the territory during World War I, and a League of Nations mandate placed it under South African trusteeship in 1920. After the founding of the United Nations in 1945, South Africa refused to surrender its mandate and place Southwest Africa under a United Nations trusteeship. In October 1966 a United Nations General Assembly resolution declared the mandate terminated, and in 1968 the General Assembly renamed the territory Namibia (after the Namib Desert, which runs along its entire Atlantic coast). South Africa continues to administer Namibia, in defiance of the United Nations and of the International Court of Justice, which has also declared the mandate terminated. *See* p.211 *infra*.

The past two years have witnessed complicated maneuvering by internal forces for power over the future of Namibia, and complex negotiating efforts by the major Western powers to persuade South Africa to accept Namibian independence with black majority rule. *See* pp. 250-56 *infra*. At present, the outcome of these developments remains uncertain.

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congressional or presidential actions?[7]

The first question involves the threshold issues of jurisdiction and standing. Litigation seeking to enforce United Nations resolutions in American courts is especially likely to be vulnerable to these threshold challenges, because it involves both the sensitive foreign affairs area and (probably) "public interest" plaintiffs.[8]

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7. The focus of this article is on the influence of international law on United States domestic law. Consequently, this article will not address the validity under international law of decisions by the International Court of Justice or of United Nations resolutions. International legal periodicals have exhaustively treated the question of whether United Nations resolutions are binding as a matter of international law, and the majority of commentators have answered it affirmatively. *See, e.g.*, Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?* 21 INT'L & COMP. L.Q. 270, 286 (1972); Note, *Security Council Resolutions in United States Courts*, 50 IND. L.J. 83 (1974). *But see* Watson, *Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter*, 71 AM. J. INT'L L. 60 (1977).

A conclusion that United Nations resolutions in general and those respecting Namibia *were not* binding under international law, of course, would end any chance of success for litigation like that in Diggs v. Dent, *supra* note 2. In any event, the district court in *Dent* easily crossed this preliminary hurdle and implicitly decided that they *were* binding. Indeed, defendants did not contest this issue, although they did contend that the Security Council resolutions in question were not binding as a matter of United States domestic law. Thus this article assumes, on the basis of the majority of commentators and the *Dent* decision, that International Court of Justice decisions and United Nations resolutions are binding as a matter of international law.

8. Actions to enforce United Nations resolutions in American courts are especially likely to involve "public interest" plaintiffs because 1) the group (Namibians) with the most important interests at stake is located in a foreign land, and such foreign residents would have great difficulty suing in American courts; 2) consequently, if such litigation is to be undertaken, it will almost necessarily have to be done by surrogates for the foreign group, as in *Dent;* and 3) such surrogates are likely to be motivated by the desire to vindicate the collective rights and interests of the foreign group, rather than interests peculiar to them as individuals. In addition, insofar as the surrogate plaintiffs are Americans

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Accordingly, it is necessary first to investigate whether a court might disclaim jurisdiction of the case under the political question doctrine, and second to examine the problem of standing to bring private suits on questions of international affairs.

Once the threshold questions of jurisdiction and standing have been considered, it is appropriate to consider the substantive question of whether United Nations resolutions are binding and enforceable as a matter of United States domestic law. The issues discussed here are whether United Nations member states are obligated to comply with Security Council resolutions; whether the United Nations Charter and Security Council resolutions constitute international legal obligations of the United States; whether the United States recognizes any such obligation as a matter of United States domestic law; and whether the Charter and Security Council resolutions are self-executing treaties under American law, or, if not, whether they have ever been "executed".

The final question considered in the article encompasses the theory of "override". Even if United Nations resolutions in general prove to be valid under the substantive tests outlined in the preceding paragraph, a particular resolution could be deprived of any effect if an American court determines that Congress or the President has manifested, through inconsistent subsequent action, an intent to override or negate that resolution. This part of the article will first outline the legal foundation of the theory of override. It will then investigate the official position of the State Department and the executive branch with respect to United Nations resolutions on Namibia, assessing whether this record embodies an intention to override the presumed obligations of the United States. In conclusion, this article will discuss

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Footnote 8 continued
rather than members of the foreign group, their stake in the group's rights and interests is likely to be somewhat indirect and derivative.

Courts have questioned the efforts of those purporting to defend the interests of others--the "public interest"--rather than their own personal interests. The doctrine of standing to sue has developed as the principal means of eliminating such lawsuits. *See* pp. 196-209 *infra* (discussion of standing).

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whether the outcome of *Dent*[9] signaled the futility of efforts to enforce United Nations resolutions through litigation in American courts, or whether such efforts might still succeed in the future.

The Namibian Fur Seal Skins Case

Before addressing any legal issues, it is first necessary to give a brief outline of the history of the fur seal skins litigation. For at least a century South African Cape fur seals, which live on the mainland and coastal islands of Southern Africa from Cape Cross in Namibia to Algoa Bay in South Africa, have been hunted for their skins. Seals from both Namibia and South Africa are annually "harvested" under the authority of the South African government's Marine Fisheries Service and then exported in large numbers for the manufacture of coats.

In 1973 the Fouke Company of South Carolina became interested in importing these seal skins. The Marine Mammal Protection Act of 1972 (MMPA), however, imposed a moratorium on the taking (capture or killing) or importation of seals and other marine mammals.[10] Thus the Fouke Company was required to seek a waiver of this prohibition from the National Marine Fisheries Service (NMFS) of the Commerce Department's National Oceanic and Atmospheric Administration, the agency entrusted by Congress with administration of this portion of the MMPA. Two distinct groups opposed the granting of this waiver: conservationists determined to prevent any weakening or dilution of the MMPA,[11]

9. The court in *Dent* granted defendants' motion to dismiss on the grounds that the Security Council resolutions invoked by plaintiffs did not confer legally enforceable rights upon the plaintiffs. The Court of Appeals for the District of Columbia in Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976), affirmed this decision.

10. P.L. No. 92-522, 86 Stat. 1027 (current version at 16 U.S.C. § 1371(a) (1976)) [hereinafter cited as MMPA].

11. Among these were the Animal Welfare Institute, the Wilderness Society, the Defenders of Wildlife, the Humane Society of the United States, and Friends of the Earth, Inc.

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and the congressional Black Caucus and others claiming to defend Namibian interests.[12]

The Fouke Company imported over 42,000 Cape fur seal skins pursuant to NMFS authorization in 1973, and it applied for another waiver for the succeeding year in the fall of 1973. Commerce Department officials twice visited South Africa and Namibia to observe the seal harvest and to determine whether it complied with MMPA standards. Despite protests from congressmen and church groups, and the opinion of the State Department that such a visit would contravene United States treaty obligations under the United Nations Charter and Security Council resolutions on Namibia,[13] the Commerce Department sent a third mission to Namibia in August 1974.[14]

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12. The latter included Congressman Diggs; George Houser, Executive Director of the American Committee on Africa; Theo-Ben Gurirab, Representative Plenipotentiary of the Southwest Africa People's Organization (SWAPO) to the United Nations; and SWAPO itself, on behalf of itself and its members. This group was, of course, particularly concerned with seal skins from Namibia. The conservationists, on the other hand, wished to prevent the importation of seal skins from South Africa as well. They eventually prevailed in Animal Welfare Inst. v. Kreps, 561 F.2d 1002 (D.C. Cir. 1977), *cert. denied sub nom.* Fouke Co. v. Animal Welfare Inst., 434 U.S. 1013 (1978), in which the court of appeals overturned the Commerce Department's grant of a waiver to permit importation of seal skins from South Africa, holding that it was inconsistent with the MMPA.

13. *See* pp. 263-65 *infra* (discussing State Department opinion) Letter from United States Senators to Robert Ingersoll, Under Secretary of State (July 30, 1974) (urging that 1974 Commerce Department visit to Namibia not be permitted) [on file with *Yale Studies in World Public Order*].

14. *See* the File on Diggs v. Dent, *supra* note 2, at the Center for Law and Social Policy in Washington, D.C. (hereinafter cited as *Dent* File). The File was compiled by attorneys of the International Project at the Center, who represented the plaintiffs in *Dent* and the intervenor-appellant conservationist organizations referred to in note 11 *supra*.

The author, as a Yale Law School student intern, assisted Mr. Leonard Meeker of the Center in the seal skins case during the spring semester of 1976. Mr. Meeker, who was Legal Counsel for the State Department during the Kennedy and Johnson administrations, served as lead counsel throughout this litigation. The author is grateful to Mr. Meeker for his invaluable aid in the preparation of this article.

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On August 28th, Congressman Diggs[15] and other plaintiffs[16] brought suit in the United States District Court for the District of Columbia seeking a declaratory judgment condemning the mission and asking for an injunction against further dealings involving Namibia between the Commerce Department and the South African government.[17] Plaintiffs claimed that the Commerce Department's activities violated United States treaty obligations.[18]

In May 1975, in *Diggs v. Dent*,[19] the district court granted defendants' motion to dismiss, holding that the court lacked subject matter jurisdiction because the applicable United Nations Charter provisions and Security Council resolutions did not constitute self-executing United States treaty obligations and therefore did not confer legally enforceable rights upon the plaintiffs.[20] While the court's perfunctory opinion was unfavorable to plaintiffs on the substantive issues, they gained a partial victory when the court acknowledged their standing to sue by invoking the holding in *Diggs v. Shultz*.[21]

The Court of Appeals for the District of Columbia issued its decision on the appeal of *Dent* in *Diggs v. Richardson*.[22] In a three-page opinion by Judge Leventhal, that court affirmed the dismissal of plaintiffs' action

> on the ground, related to the issue of standing, but analytically distinct, that even assuming there is an international obligation that is binding on the United States--a point we do not in any way reach on the merits--the U.N. resolution underlying that obligation does not confer rights on the citizens of the United States that are enforceable in court in the absence of implementing legislation.[23]

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15. Charles C. Diggs, Jr. (Dem. Mich.) was head of the congressional Black Caucus as well as Chairman of the Subcommittee on Africa of the House Committee on International Affairs.

16. *See* note 12 *supra* (listing plaintiffs).

17. *See* Diggs v. Dent, *supra* note 2.

18. *Id.*

19. *Id.*

20. *See id.*, 14 INT'L LEGAL MATERIALS at 803-05.

21. 470 F.2d 461 (D.C. Cir. 1972), *cert denied*, 411 U.S. 931 (1973).

22. 555 F.2d 848 (D.C. Cir. 1976).

23. *Id.* at 850 (footnote omitted).

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This was equivalent, as the court implied, to a conclusion that the provisions of the relevant Security Council resolution were not self-executing.[24] Judge Leventhal's carefully circumscribed opinion explicitly avoided, however, deciding whether and under what circumstances a Security Council resolution might be self-executing.[25]

The terse decision in *Richardson* omitted any detailed discussion of the complex issues of international law involved. Therefore, its conclusory holding may not have shut the door on all such future litigation, because the court narrowly limited the decision to the facts of the case and to only those parts of the relevant resolution invoked by plaintiffs. Since the court declined the opportunity to provide general clarification about the extent to which United Nations resolutions could become binding upon the United States, actions similar to *Dent* can be expected in the future. The balance of this article consists of a case study utilizing the seal skins case to illustrate issues relevant to lawsuits which seek to enforce United Nations resolutions in American courts.

I. The Threshold Issues

The decisions in *Diggs v. Dent*[26] and *Diggs v. Richardson*[27] point to the importance of threshold issues in litigation seeking to enforce United Nations resolutions in American courts. Plaintiffs may be barred from the courthouse at the outset and consideration of their substantive legal claims precluded. The major problems facing litigants at the threshold are the possibility that a court might decide that they lack standing to sue, and that the issues raised are non-justiciable because they present a political question. Consideration of the political question problem is analytically antecedent to the question of standing, because a judicial determination that a complaint raises a political question is equivalent to a holding that the court lacks jurisdiction of the subject matter, regardless of who the plaintiffs are. Hence the political question issue will be treated first.

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24. *Id.* at 850 n.9.

25. *Id.* at 851 n.10. ("We made [sic] no decision with respect [sic] those provisions of U.N. Security Council Resolution 301 which are not involved here.")

26. *See* note 2 *supra*.

27. 555 F.2d 848 (D.C. Cir. 1976).

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A. *The Political Question Doctrine*

The district court in *Diggs v. Dent*[28] implicitly invoked the political question doctrine to hold non-justiciable the issues raised by the case:

> Even if the court had subject matter jurisdiction, it would be forced to conclude that the issues before it are ones which are within the foreign policy authority of the President and are non-justiciable. It is not for the court to say whether a treaty has been broken or what remedy shall be given. . . . Nor should the court direct the manner in which the Executive is to carry out his foreign relation [sic] responsibilities.[29]

The court of appeals in *Diggs v. Richardson*,[30] however, avoided the political question doctrine and affirmed *Dent* on other grounds. Nevertheless, because foreign affairs questions are involved, plaintiffs in any future American lawsuit which seeks to enforce United Nations resolutions can expect to be challenged on political question grounds.

"[T]he nebulous neighborhood of political questions"[31] comprises those cases which the judiciary abstains from deciding because the issues presented appear to be entrusted by the Constitution exclusively to the executive or legislative branches. In the leading Supreme Court case in this area, *Baker v. Carr*,[32] the Court was unable to reduce political question cases to fewer than six categories,[33] thereby reflecting the

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28. *See* note 2 *supra*.

29. *Id.*, 14 INT'L LEGAL MATERIALS at 804-05 (citations omitted). Since the court had already decided that it lacked jurisdiction because the Security Council resolutions involved were non-self-executing, the court's statement was dictum.

30. 555 F.2d 848 (D.C. Cir. 1976).

31. Bickel, *The Supreme Court - 1960 Term*, 75 HARV. L. REV. 40, 74 (1961).

32. 369 U.S. 186 (1962).

33. *See* pp. 192-93 *infra* (listing six categories). The Court, over the strong dissent of Mr. Justice Frankfurter, removed the fairness of state legislative apportionments from the political question category.

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failure both courts and commentators have experienced in attempting to impose analytical order upon this doctrine.[34] The disparate nature of these categories suggests that the doctrine developed through a haphazard process of accretion rather than through the articulation of a coherent constitutional principle.

Part of the confusion surrounding the political question doctrine results from a basic disagreement among commentators about its source.[35] Two principal interpretations have developed. The first or "classical" view is that the constitutional division of powers mandates judicial abstention from deciding political questions.[36] One difficulty with the "classical" view is that the divisions of authority over political questions, especially those involving foreign affairs, are not clearly marked. Conflicts among the three branches of government exist, and spheres of authority expand and contract[37] under

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34. *See* Tigar, *Judicial Power, the "Political Question Doctrine", and Foreign Relations,* 17 U.C.L.A. L. REV. 1135 (1970) (criticizing *Baker* rule for vagueness). Professor Louis Henkin argued that the political question doctrine is merely a "package" which contains certain valid and legitimate reasons for judicial abstention; he suggests that these be retained but that the "package" be discarded. *See* Henkin, *Is There A "Political Question" Doctrine?* 85 YALE L.J. 597 (1976).

35. The courts have done little to resolve this debate; they have tended to label certain questions "political" in a conclusory way, eschewing further discussion of substantive considerations and neither explaining how they reached their conclusion nor distinguishing similar cases.

36. *See, e.g.,* Dickinson, *The Law of Nations As National Law: "Political Questions",* 104 U. PA. L. REV. 451, 492-93 (1956) (describing "classical" view); Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L.J. 517 (1966) (same); Weston, *Political Questions,* 38 HARV. L. REV. 296, 331 (1925).

37. For example, a major expansion of executive control over foreign policy, at the expense of Congress, was made possible by United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). In that case, the Supreme Court upheld President Roosevelt's authority, conferred by Congress, to prohibit American export of arms to foreign countries when he determined that such export would entail a threat to peace. Justice Sutherland's opinion contended that at the time of the Revolution the foreign policy powers of the British Crown devolved collectively upon the colonies rather than individually. From this he concluded that, even in the absence of a specific constitutional provision or express congressional authorization, the executive possessed a broad if not exclusive discretion to conduct the nation's foreign affairs.

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the influence of changing circumstances and personalities.[38] What might be regarded as usurpation or abdication in one era becomes the accepted norm during the next. While the "classical" approach based on the constitutional separation of powers is logically appealing, it fails to explain the complexities of the case law or to yield a workable rule to determine what questions in future cases will be considered political.

Nonetheless, the constitutional scheme implies that judicial scrutiny of many political questions is inappropriate. For example, Article II gives the executive exclusive power to appoint ambassadors and to negotiate and conclude treaties with the advice and consent of the Senate.[39] Although the Constitution does not exclude such areas from judicial review, courts have often applied the political question doctrine in

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38. This phenomenon is perhaps most marked in the growth of executive power over foreign policy from the Roosevelt to the Nixon administrations, and the contrary trend since that time. The Vietnam War provided the impetus for Congress to reassert its control over foreign policy. In 1969 the Senate passed the National Commitments Resolution, which called upon the President not to commit troops or financial resources to foreign countries without Congress' express approval. The War Powers Resolution, 50 U.S.C.A. §§ 1541-1548 (1973 ed.), limited the President's authority to commit troops to hostilities abroad unless Congress first gave its express approval. Some observers see signs in 1979 that the pendulum has begun to swing back toward presidential power over the conduct of foreign policy. *See, e.g.*, Finney, *War Powers Pendulum Swings Back - A Little*, N.Y. Times, Apr. 8, 1979, § 4, at E5, col. 1. The fate of the lawsuit recently filed by Senator Barry Goldwater, which challenges President Carter's power to terminate the defense treaty with Taiwan without prior congressional approval, may indicate how far this trend has progressed. *See* Goldwater, *Treaty Termination Is a Shared Power*, 65 A.B.A. J. 198 (1979).

39. U.S. CONST. art. II, § 2, cl. 2.

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either deferring to the executive view or in abstaining from deciding cases involving foreign affairs questions.[40] In fact, no United States treaty has ever been declared unconstitutional by the Supreme Court, although this would not be impossible.[41]

The prevalent interpretation of the political question doctrine among contemporary commentators follows the "prudential" theory, which developed in reaction to the inadequacies of the "classical" theory. According to the "prudential" view, judicial abstention in political question cases is a matter of discretion rather than a constitutional obligation.[42] An examination of the lawsuits attacking the constitutionality or legality of the Vietnam War[43] lends support to this theory. The courts dismissed almost all of these cases on political question grounds.[44] If judicial abstention were constitutionally mandated, the courts would have withdrawn at the outset of each such case before reaching any of the substantive issues. Instead, they invoked the doctrine at different stages of their consideration of the issues.

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40. *See* pp. 186-88 *infra* (discussion of Vietnam War cases).

41. The latest challenge to the constitutionality of a treaty was Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978), which was brought by 30 members of the House of Representatives opposed to the Panama Canal treaties. Plaintiffs argued that the treaties were unconstitutional because they disposed of federal property without the consent of the House of Representatives as required by U.S. CONST. art. IV, § 3, cl. 2. The Supreme Court rejected this claim, on the grounds that art. II, § 2, cl. 2, gave the President and the Senate full authority to take such action. *See* Note, *PANAMA CANAL -- Legal Issues Involved in the Transfer of the Canal to Panama*, 19 HARV. INT'L L.J. 279 (1978) (discussing *Edwards*).

42. *See, e.g.*, Bickel, *supra* note 31; Scharpf, *supra* note 36.

43. *See* pp. 186-88 *infra*.

44. The one exception was Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 410 U.S. 936 (1974). In *Holtzman*, District Judge Judd issued an injunction on July 25, 1973, barring the government from participating in military activities in or bombing raids over Cambodia on the grounds that there was no congressional authority for such activities. *Id.* at 566. The Second Circuit, however, reversed the district court's judgment and directed it to dismiss the complaint. 484 F.2d 1307 (2d Cir. 1973).

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Prudential considerations stemming from the uniquely sensitive nature of foreign relations probably account for the fact that the political question doctrine has had "its most comprehensive development" in the area of foreign affairs.[45] International law is essentially based on consensus among states. Unlike the United States Supreme Court, which imposes domestic legal obligations and sets uniform domestic norms when it proclaims "what the law is", no court can impose international legal obligations on a nation-state or set international legal norms in the absence of consensus. Consequently, American courts have recognized that decisions based on American law would not bind foreign governments to comply with American standards and procedures.[46] Foreign adherence to American law can be won only through the flexible give-and-take of political negotiations.

Chief Justice John Marshall exerted a formative influence on the political question doctrine in the first case raising this issue. In refusing to adjudicate a boundary dispute growing out of the Louisiana Purchase, the Chief Justice stated in

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45. Dickinson, *supra* note 36, at 452.

46. One outcome of this principle is that the courts have traditionally been reluctant to adjudicate matters arising in foreign territories because this might represent an infringement on the complete sovereignty of a foreign power over its own territory. In Oetjen v. Central Leather Co., 246 U.S. 297 (1918), a high point of judicial abstention on political questions, the Supreme Court stated that "[t]o permit the validity of the acts of one sovereign State to be reëxamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" *Id.* at 304. And in Underhill v. Hernandez, 168 U.S. 250 (1897), the Supreme Court cautioned that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Id.* at 252.

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Foster & Elam v. Neilson[47] that

> [i]f those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature.[48]

Later courts have sometimes appeared to remove foreign affairs questions completely from the scope of permissible adjudication.[49] But the Supreme Court rejected such an extreme rule in *Baker v. Carr:*[50]

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47. 27 U.S. (2 Pet.) 253 (1829). Ironically, the result in this case was later overturned in United States v. Arredondo, 31 U.S. (6 Pet.) 691, 741 (1832) and United States v. Percheman, 32 U.S. (7 Pet.) 51, 87-88 (1833), on the authority of the Spanish text of the treaty, which was considered superior to the English text. The validity of the principles enunciated in *Foster & Elam* with respect to the political question doctrine has nevertheless continued undiminished. *See, e.g.*, Maiorano v. Baltimore & Ohio R.R. Co., 213 U.S. 268, 272-73 (1909); Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 598-99 (1884); Scharpf, *supra* note 36, at 575-76.

48. 27 U.S. (2 Pet.) at 309.

49. *See, e.g.*, Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948):

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

50. 369 U.S. 186 (1962).

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> There are sweeping statements to the effect that all questions touching foreign relations are political questions. . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question "governmental action . . . must be regarded as of controlling importance," if there has been no conclusive "governmental action" then a court can construe a treaty and may find it provides the answer.[51]

The holding that the issues raised by *Diggs v. Dent*[52] were non-justiciable in effect invoked the political question doctrine: "Even if the court had subject matter jurisdiction it would be forced to conclude that the issues before it are ones which are within the foreign policy authority of the President and are non-justiciable."[53] This cryptic statement, however, raises more questions than it answers.

The statement has two possible constructions. If the court meant that all foreign policy issues are non-justiciable, such an assertion contradicts not only the *Baker* dictum but also a number of cases in which the Supreme Court adjudicated such issues. It is well-settled, for instance, that the courts can both interpret treaties[54] and adopt interpretations which conflict with those of the executive.[55]

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51. *Id.* at 211-12 (footnote omitted).

52. *See* note 2 *supra*.

53. *Id.*, 14 INT'L LEGAL MATERIALS at 804.

54. *See, e.g.*, Jones v. Meehan, 175 U.S. 1 (1899); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Dickinson, *supra* note 36, at 489-90.

55. *See, e.g.*, Perkins v. Elg, 307 U.S. 325 (1939); United States v. Rauscher, 119 U.S. 407 (1886).

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On the other hand, if the district court in *Dent* was merely stating its conclusion that the particular foreign policy questions raised by the case were non-justiciable, it failed to explain how it reached this conclusion and instead begged the question. This failure stemmed in part, no doubt, from the difficulty of deriving from the case law any workable rule for identifying political question cases. The lack of conceptual clarity in this area may explain why the court of appeals in *Diggs v. Richardson*[56] avoided the political question doctrine and affirmed *Dent* on other grounds. Since the appellate decision left the political question issue in the first seal skins case unresolved, it is appropriate to investigate further the standards necessary to determine when lawsuits to enforce United States treaty obligations present a political question.

As noted above, constitutional and legal principles are of little assistance in explaining the divergent results in political question cases. Consideration of the political context of the cases, however, may shed some light on the subject. In its origins in *Foster & Elam v. Neilson*,[57] the word "political" in the term "political question" referred to the functions of the executive and legislative branches, the elected branches of the federal government.[58] More recent case law suggests, however, that the significance and application of the term have evolved in the direction of judicial abstention from cases which are politically "sensitive". This sensitivity is related more to the political context of the issues or to the position taken by the executive or legislative branch than to a reasoned view of a proper constitutional allocation of powers among the various branches of government. In effect, the prudential rather than the classical interpretation of the political question doctrine has dominated the case law.

The Supreme Court in *Baker*, for instance, emphasized the importance in political question cases

56. 555 F.2d 848 (D.C. Cir. 1976).
57. 27 U.S. (2 Pet.) 253 (1829).
58. *See id.* at 309, 314; note 49 *supra*.

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of analyzing "the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case."[59] The Court further implied that one indication that judicial construction of a treaty might be appropriate is the fact that "no conclusive 'governmental action'" has been taken on the matter.[60] Significantly, the approach suggested by the Court for identifying political question cases is not based on pure constitutional analysis but rather on a consideration of political context. *Foster & Elam v. Neilson*[61] suggested a similar approach when it based judicial abstention on executive assertions of territorial dominion and on the "pronounced will" of the legislature.[62] Accordingly, it is more illuminating in analyzing political question cases to adopt a prudential view which focuses on the political context from which the issues arise and on the position taken by the executive on the issues.

One authority has grouped political question cases in the foreign affairs area in five major categories.[63] The first four of these, which concern territorial disputes, recognition of governments, sovereign immunity, and the exclusion and expulsion of aliens, are specific, discrete clusters of cases whose only unifying thread is the judiciary's notion that they present sensitive foreign policy questions. They do not lend themselves to conceptual generalizations from which one can extrapolate to cases presenting other foreign policy questions. A brief review of these four categories will demonstrate that they bear little resemblance to the kind of political question issues raised in *Dent* or similar prospective litigation.

Some analogies to *Dent* can be drawn, however, from the last category (cases concerning treaties) and from a new category which comprises the most important group of political question cases in recent years--the cases challenging the federal government's conduct of the Vietnam War. Not all the cases in

59. 369 U.S. at 211-12.
60. *Id.* at 212.
61. 27 U.S. (2 Pet.) 253 (1829).
62. *Id.* at 309.
63. *See* Dickinson, *supra* note 36.

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these categories have been held to present political questions, and resolution of the political question issue with respect to them requires more detailed analysis. Upon closer scrutiny, nevertheless, it will be seen that the political question cases in the latter two categories are also distinguishable from *Dent* in essential respects. Consequently, as the district and circuit courts in *Dent* implicitly recognized, the political question doctrine should not pose an insuperable barrier to adjudication.

Foster & Elam, the first territorial dispute case to raise a political question issue, involved a challenge to the federal government's official position in a dispute with Spain over the boundaries between Spanish Florida and the United States. Such a territorial dispute is the classic situation in which judicial abstention and deference to executive and legislative action are deemed appropriate. Indeed, it would have been almost inconceivable for the Supreme Court in the nineteenth century to question the process by which the nation extended its rule over a continent and the surrounding seas.[64]

Subsequent courts, accordingly, took a similar approach in such circumstances. For instance, the defendant in *Jones v. United States*[65] was convicted of a murder committed on an island in the Caribbean claimed by the United States. On appeal he argued that the lower court had lacked jurisdiction because the act annexing the island to the United States was unconstitutional. The Supreme Court dismissed the claim on political question grounds.

The Supreme Court in *In re Cooper*[66] again displayed deference towards an American territorial claim. The United States had recently purchased Alaska and was attempting, over British opposition, to enforce an American statute which restricted seal hunting. American authorities seized a British sealing ship more than fifty miles off the coast of Alaska. A lower court dismissed a challenge to this action, and the Supreme Court refused to

64. *See generally* J. PRATT, AMERICA'S COLONIAL EXPERIMENT (1950) (history of United States' expansionist movement).

65. 137 U.S. 202 (1890).

66. 143 U.S. 472 (1892).

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review the dismissal.[67]

Recognition of foreign governments is a second category in which the courts have viewed the executive's position as exclusively controlling.[68] The issue of recognition is an area in which the executive cannot avoid taking a position: failure of the United States to act on a government's claim to recognition itself constitutes an affirmative decision by the executive, even though the decision may be provisional and subject to change. Thus the Supreme Court has viewed an unrecognized foreign government as "a republic of whose existence we know nothing."[69]

It would be an undesirable encroachment upon the executive's foreign policy if the courts were to declare the legitimacy of a foreign government before the executive had done so; the encroachment would become outright interference were the courts to "recognize" a government when the executive had refused to do so.[70]

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67. Section 1956 of the Revised Statutes prohibited the killing of fur seals "'within the limits of Alaska Territory, or in the waters thereof'", and an Act of Congress in 1889 stated that Section 1956 applied to the United States dominion in the waters of the Bering Sea. *See id.* at 496-97 (citing statutes). While there was considerable doubt that Russia possessed such dominion and could transfer it by the 1867 Treaty ceding Alaska to the United States, the Supreme Court upheld the seizure on this authority. *See* Dickinson, *supra* note 36; at 459-61 (discussing *Cooper*). A trend by many countries toward extending their off-shore sovereignty in recent years has revived this issue.

For additional examples of judicial deference to the executive branch's treatment of territorial claims, see Wilson v. Shaw, 204 U.S. 24, 32-33 (1906) (upholding the legality of the acquisition of the Panama Canal Zone); Williams v. The Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839) (executive rejection of "Buenos Ayres" government's claim of sovereignty over the Falkland Islands held binding upon the judiciary).

68. *See* Dickinson, *supra* note 36, at 464-69.

69. United States v. Klintock, 18 U.S. (5 Wheat.) 144, 149 (1820).

70. It is most doubtful, moreover, whether foreign governments would credit judicial determinations of recognition which differed from those of the executive.

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As a practical matter, the fact that many nations experience frequent changes of government makes executive authority over questions of diplomatic recognition essential. The executive is able to make flexible and pragmatic adjustments to ever-changing international conditions, while the decisions of the judiciary reflect the rigidity of legal principles. The executive, furthermore, can act immediately in each instance where the question of recognition arises, while the constitutional prohibition against the issuance of advisory opinions by the courts precludes the judiciary from deciding the question unless it is litigated.[71] Consequently, the courts have traditionally treated recognition of foreign governments as a political question within the exclusive control of the executive.[72]

The resolution of territorial boundary and recognition issues clearly hinges on the determination of complex factual questions and international political issues which are best handled by the executive. The sovereign immunity from lawsuits enjoyed by foreign governments in American courts, on the other hand, might seem at first blush to be a matter of pure legal principle appropriate for judicial decision. Nevertheless, a significant group of political question cases has developed in this area,

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71. *See* U.S. CONST. art. III, § 2, cl. 1 (authorizing the federal courts to decide only "cases or controversies").

72. *See, e.g.*, Kennett v. Chambers, 55 U.S. (14 How.) 38, 50-51 (1852). The history of United States recognition of the Soviet Union illustrates this point. Until 1933 the United States refused to recognize the new government. Consequently, it was refused standing in American courts. In United States v. Pink, 315 U.S. 203 (1942) (argued and decided during the early months of the United States-Soviet alliance in World War II), the Supreme Court reversed its position. Indeed, on the strength of the executive's Litvinov Assignment agreement with the Soviet Union concerning the settlement of private creditors' claims, the Court gave extraterritorial effect to decrees of the Soviet Government issued even before its recognition.

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and sovereign immunity appears to have become a subcategory of the political question doctrine, at least in the operational sense. This has come about because an issue akin to that of recognition arises in such litigation: to what extent are foreign sovereigns acting in their governmental capacity--and thus entitled to sovereign immunity--when they are involved in quasi-governmental activities such as shipping? In deciding whether to accord sovereign immunity to such foreign activities the courts have, as in the case of territorial boundary questions, deferred to and solicited the opinion of the executive.

The tradition of consulting the opinion of the executive branch on claims of sovereign immunity for foreign ships originated in *The Schooner Exchange v. McFaddden.*[73] In *The Schooner Exchange*, a United States Attorney filed a "suggestion" requesting the dismissal of a libel in admiralty brought by the purported owners of a former American merchant ship which had been confiscated by Napoleon and which later entered the port of Philadelphia. The Supreme Court dismissed the action, accepting the United States Attorney's argument that foreign ships of war entering American ports were exempt from American jurisdiction.[74]

Courts have continued since *The Schooner Exchange* to defer to the executive's position on whether to allow claims to sovereign immunity by foreign governments.[75] This principle of deference was, moreover,

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73. 11 U.S. (7 Cranch) 116 (1812); *see* Dickinson, *supra* note 36, at 469-79 (discussing sovereign immunity of ships). A large proportion of the sovereign immunity cases concern ships; a partial explanation for this may be the fact that admiralty law enables a plaintiff who libels a ship *in rem* to shift the burden of proof to the defendant, who then must plead sovereign immunity as an affirmative defense.

74. 11 U.S. (7 Cranch) at 146-47.

75. *See, e.g., Ex parte* Muir, 254 U.S. 522, 533 (1921) (endorsing the practice of judicial deference to executive "suggestions" on sovereign immunity on the grounds that "it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision"). *But see* Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926) (although the State Department had not presented any "suggestion," the Court rejected the State Department's general position on the substantive legal issues of whether to grant sovereign immunity to foreign commercial ships).

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affirmed and extended in two decisions by the Stone Court. In the first case, *Ex parte Peru*,[76] a United States Attorney, acting upon the advice of the State Department, endorsed the claim of sovereign immunity advanced by the Peruvian government on behalf of a Peruvian steamship. The district court, however, found that sovereign immunity had been waived.[77] The Supreme Court, ruling on a petition for a writ of mandamus to the district court, held that the district court should have relinquished its jurisdiction once the State Department made its position known. The danger to avoid, according to the Court, was embarrassing the executive branch with a contrary judicial determination:

> [C]ourts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations. . . . Upon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant to the relief obtainable through diplomatic negotiations. . . . This practice is founded upon the policy, recognized both by the Department of State and the courts, that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.[78]

The Stone Court subsequently established a corollary proposition in sovereign immunity cases in *Republic of Mexico v. Hoffman*.[79] In *Hoffman*, it treated the *refusal* of the State Department to certify the soveriegn immunity of a ship owned by Mexico as conclusive upon the courts. Since *Hoffman*, the courts have continued to follow the State Department's

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76. 318 U.S. 578 (1943).
77. The Ucayali, 47 F. Supp. 203, 206 (E.D. La. 1942).
78. 318 U.S. at 588-89.
79. 324 U.S. 30 (1945).

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suggestions with respect to sovereign immunity.[80]

As we have seen, the position taken by the executive has proven decisive in most political question cases involving territorial boundaries, recognition, and sovereign immunity. Historical circumstances, however, have played a more decisive and central role in a fourth area of political question cases, the alien exclusion cases. In *Chae Chan Ping v. United States*[81] and *Fong Yue Ting v. United States*,[82] the Supreme Court upheld legislative decisions to exclude Chinese immigrants from the United States as political decisions which could not be challenged in the courts.[83] Although the Court viewed the right to exclude aliens as an inherent attribute of national sovereignty, a

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80. This deference is all the more noteworthy since the State Department's position on the substantive issues of sovereign immunity has evolved during this period. The Department adopted the "restrictive" view that sovereign immunity should not benefit merchant ships in the Tate Letter of 1952, 26 DEP'T STATE BULL. 984 (1952), and this approach was subsequently codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1976).

Some commentators have deemed this deference to the executive to be so extreme as to constitute abdication of an essential judicial role. *See, e.g.*, Jessup, *Has the Supreme Court Abdicated One of Its Functions?* 40 AM. J. INT'L L. 168 (1946); *cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 439 (1964) (White, J., dissenting) (criticizing Court's total deference to the executive). There is no indication, however, that this deference will be abandoned.

81. The Chinese Exclusion Case, 130 U.S. 581 (1889).

82. 149 U.S. 698 (1893).

83. The continuing validity of the alien exclusion cases was recently affirmed by the Court in Matthews v. Diaz, 426 U.S. 67, 81 (1976), although the Court intimated that limited judicial review was appropriate in some immigration and naturalization questions. *Id.* at 82. See also Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (holding that the right to expel resident aliens is a corollary of the right to exclude the entry of aliens).

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consideration of such cases cannot ignore the climate of anti-Asian racism in the American West during the last century. This climate, which stemmed in part from the fear of competition for jobs by Chinese and Japanese immigrants, was responsible for the treaties and statutes barring such immigrants; it also influenced the Court's reaction in these cases.

Sensitive political issues and the position taken by the executive both played an important role in the fifth group of political question cases: the lawsuits attacking the constitutionality or legality of the Vietnam War. Engaging in war is the most complex and sensitive of the foreign policy powers shared by Congress and the President. Not surprisingly, therefore, all but one[84] of the federal courts which decided lawsuits challenging the legality or constitutionality of the war in Indochina either concluded that they should not exercise jurisdiction because political questions were involved, or--if they rejected the political question defense and ruled the issues justiciable--upheld the legality and constitutionality of the challenged executive actions and measures. The Supreme Court sidestepped the opportunity to clarify the applicability of the political question doctrine to the exercise of war powers[85] when it denied certiorari in all of these cases except one, *Atlee v. Laird*,[86] which it affirmed without opinion.[87]

The practical result in all of these cases was to uphold the legality of the executive's policies and its conduct of the war. The different lines of reasoning by which the courts reached this practical result, however, are difficult to reconcile.[88] While some courts did not invoke the political question doctrine at all, those that did invoked it at varying stages of their adjudication. Some courts refused even to consider whether American participation in the hostilities in Vietnam was a "war" in the constitutional sense, on the grounds that this was a political

84. *See* note 44 *supra*.
85. *See* U.S. CONST. art. I, § 8, cl. 11.
86. 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973).
87. 411 U.S. 911 (1973).
88. See p. 174 *supra*.

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question.[89] Other courts decided that they had jurisdiction to consider this question and concluded that the Vietnam involvement was a constitutional war.[90]

The only unifying thread in the Vietnam cases appears to be a pronounced disinclination on the part of the federal courts to question executive policies in such a sensitive foreign policy area. Litigation to enforce Security Council resolutions, on the other hand, would not, ordinarily, pose such profoundly sensitive political questions, even if Congress or the President had publicly opposed such resolutions. Past Security Council resolutions have not affected thousands of American lives nor challenged a central area of American foreign policy as did the Indochina conflict. Future Security Council resolutions are unlikely to deviate from this pattern.

Another distinguishing feature of the Vietnam War lawsuits is that the executive policies they challenged were at least tacitly endorsed by Congress. The constitutional arguments of plaintiffs that the

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89. *See, e.g.*, Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973); Atlee v. Laird, 347 F. Supp. 689, 705 (E.D. Pa. 1972), *aff'd sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973).

90. *See, e.g.*, Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971).

Other issues concerning the Vietnam War which courts held presented political questions included: (1) whether President Nixon after 1969 fulfilled his "duty" to try to end the war as promptly as was consistent with the national interest and the safety of the American combatants, *see* Mitchell v. Laird, 488 F.2d 611, 616 (2d Cir. 1973); (2) whether Congress had taken sufficient action to authorize continuation of the war by the executive, *see* Atlee v. Laird, 347 F. Supp. 689, 706 (E.D. Pa. 1972), *aff'd sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973); (3) whether the President had conducted the war in a constitutional fashion and whether he was justified in maintaining American forces in Southeast Asia, *see id.*; (4) whether the President was empowered to wage war in the absence of a congressional declaration of war, *see* Sarnoff v. Connally, 457 F.2d 809, 810 (9th Cir. 1972); (5) whether the May 1972 mining of North Vietnam's ports and harbors constituted an unlawful escalation of the war in the absence of an explicit congressional authorization, *see* DaCosta v. Laird, 471 F.2d 1146, 1147-50 (2d Cir. 1973); and (6) whether the 1973 bombing of Cambodia was a basic change in American conduct of the war requiring renewed congressional authorization or a tactical decision within the President's discretion, *see* Holtzman v. Schlesinger, 484 F.2d 1307, 1311-13 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

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executive had unlawfully usurped Congress' role with respect to war were undercut by the fact that Congress had continued to vote funds to carry on the war and had repeatedly defeated resolutions calling for its termination.[91] The courts, not surprisingly, concluded that this accord between the two political branches satisfied constitutional requirements and precluded judicial review.[92] Thus, the situation with respect to United States policy on Namibia is readily distinguishable from the Vietnam War cases, since Congress has not taken a collective stand on the subject of Namibia.

Moreover, the executive itself acted consistently during the Vietnam War. In the Namibian seal skins case, on the other hand, there was disagreement within the executive branch, which ended only when the Commerce Department bowed to the State Department's view that importation of the fur seal skins could not be harmonized with the international legal obligations of the United States.[93] The views of the State Department concerning the existence and validity of such legal obligations are entitled to "much weight,"[94] and perhaps this ultimately influenced the Commerce Department to stop invoking executive primacy in support of a position the State Department opposed. For some time, however, the Commerce Department persisted in its support for the importation waiver despite State Department opposition. In the presence of such executive disarray, courts are likely to prove less reluctant to hurdle the political question barrier and resolve the controversy than in a conflict like the Vietnam War, in which executive policy was consistent.[95]

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91. See, e.g., Massachusetts v. Laird, 451 F.2d 34 (1st Cir. 1971); DaCosta v. Laird, 448 F.2d 1370 (2d Cir. 1971).

92. Orlando v. Laird, 443 F.2d 1039, 1042-43 (2d Cir. 1971); *see* Massashusetts v. Laird, 451 F.2d 34 (1st Cir. 1971).

93. See p. 103 *infra.*

94. Sullivan v. Kidd, 254 U.S. 433, 442 (1921).

95. It is difficult, of course, to predict what the respective positions of the President and of Congress might be in future disputes involving Security Council resolutions, but disagreement within the branches or between them, such as occurred in Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied,* 411 U.S. 931 (1973), is not improbable.

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The sixth and final category or political question cases, which involves claimed United States obligations under treaties, has the greatest bearing on the Namibian case and prospective similar litigation. Plaintiffs in the Namibian case invoked United States international obligations under the United Nations Charter. The Charter is a treaty of the United States, and treaties have the same binding domestic effect as statutes. The strongest basis for seeking to force compliance by the United States with United Nations resolutions is the argument that resolutions are as binding on the United States as the Charter under whose authority they were passed. Thus in seeking to enforce Security Council resolutions in United States courts, plaintiffs were in effect invoking American treaty obligations.

Cases in which treaty obligations have been raised in American courts cannot all be classified under the political question doctrine, but many of them have been held to raise non-justiciable issues.[96] The courts have held both the negotiation of treaties and questions concerning the validity or duration of treaties to be matters exclusively reserved for executive control.[97] The courts have also declined to adjudicate whether a foreign sovereign had the capacity to enter into a treaty. In *Doe v. Braden*,[98] for example, a plaintiff claimed land in Florida under a grant from the King of Spain made shortly before Spain ceded the land to the United States. The United States insisted upon including a provision in the treaty annulling this grant, and the King of Spain agreed. Plaintiff argued that this annulment was illegal under Spanish law and that the United States government could not sanction such an injustice. A unanimous Supreme Court ruled, however, that determination by the President and Senate that Spain had validly ratified the treaty under Spanish law was conclusive and that the Court had no authority to review this determination because it raised a political

96. *See* Holmes v. Laird, 459 F.2d 1211, 1215 n.26 (D.C. Cir. 1972) (citing cases); Dickinson, *supra* note 36, at 484-92 (same).

97. *See, e.g.*, Charlton v. Kelly, 229 U.S. 447 (1913); Terlinden v. Ames, 184 U.S. 270 (1902); Doe v. Braden, 57 U.S. (16 How.) 635 (1853).

98. 57 U.S. (16 How.) 635 (1853).

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question.[99]

Similarly, courts have deferred to the executive's determination of whether the violation of a treaty by a foreign country or a country's loss of independent existence terminates a treaty between it and the United States. In *Terlinden* v. *Ames*,[100] for instance, American authorities had taken steps to comply with a request by the German government to extradite a German citizen to face criminal charges in Germany. The plaintiff argued that the treaty authorizing such extradition, which had been entered into by the United States and Prussia, had been terminated by Prussia's subsequent integration into the German empire. Nevertheless, the United States and Germany continued to treat the treaty as binding, and the Supreme Court refused to review this determination. The court stated, "We concur in the view that the question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard."[101]

In *Charlton v. Kelly*,[102] plaintiff's case for resisting extradition to Italy was stronger: the evidence was clear that the Italian government had refused to abide by and had violated the treaty at issue. The State Department, however, elected to view the treaty as still in force. The Supreme Court ruled that Italy's violation made the treaty merely voidable rather than void, that the executive's decision to waive Italy's default was controlling, and that the treaty therefore remained in effect.

Doe, *Terlinden*, and *Charlton* apparently reflect a judicial rule which holds that the President or an appropriate executive official is authorized to determine the duration and validity of an international agreement used by the United States in the conduct of its foreign relations. A different rule applies, however, in interpreting treaty obligations when the

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99. *Id.* at 657-58.
100. 184 U.S. 270 (1902).
101. *Id.* at 288.
102. 229 U.S. 447, 469-76 (1913).

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validity of the underlying treaty is unquestioned.[103] Courts are not barred by political question considerations from interpreting treaties. Courts, however, have been reluctant to decide whether high government officials have violated treaty obligations. Nevertheless, in various cases, the courts have interpreted and applied treaty law in controversies involving alleged treaty violations by lower government officials.

In *Chew Heong v. United States*,[104] for instance, the Supreme Court under authority of a treaty between the United States and China ordered immigration officials to readmit plaintiff, a Chinese alien, to the United States, notwithstanding a statute which restricted Chinese immigration. In *Fourteen Diamond Rings v. United States*,[105] the Court overturned a ruling by customs authorities that the Philippine Islands were to be considered a foreign country after Spain had signed the 1898 treaty ceding the Philippines to the United States. The Court held that an American soldier returning home after the Spanish American War did not have to pay a foreign import duty on rings which he had brought from the Philippines.

The Supreme Court ordered the Coast Guard to release a British ship suspected of furnishing liquor to American smugglers during Prohibition in *Cook v. United States*,[106] on the grounds that the Coast Guard had erroneously concluded that the terms of an American treaty with Britain were overridden by a tariff statute. In *Bacardi Corp. of America v. Domenech*,[107] the Court instructed the Treasurer of

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103. The Court stated in Doe v. Braden that it was a judicial duty "to interpret [a treaty] and administer it according to its terms." 57 U.S. (16 How.) 635, 657 (1853). According to the American Law Institute, "[u]nder the law of the United States, courts in the United States have exclusive authority to interpret an international agreement to which the United States is a party for the purpose of applying it in litigation as the domestic law of the United States." RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 150 (1965).

104. 112 U.S. 536, 549-50 (1884).

105. 183 U.S. 176 (1901).

106. 288 U.S. 102, 114-20 (1933).

107. 311 U.S. 150 (1940).

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Puerto Rico to cease enforcement of a 1937 Puerto Rican statute limiting the use of foreign trade names. The Court found that the statute was inconsistent with the 1929 General Inter-American Convention for Trademark and Commercial Protection.[108]

In these cases, the courts did not hesitate to compel federal officials, albeit minor ones, to perform duties mandated by American treaties. Political question considerations did not bar the exercise of such compulsion.[109] Such cases thus demonstrate that not all questions of treaty law are reserved exclusively for executive determination, although they do not reveal whether or not the Namibian case or other prospective cases to enforce Security Council resolutions in American courts are justiciable. The only apparent way to determine whether courts will find that a non-justiciable political question is present in the Namibian case is to make a more detailed analysis according to the six *Baker v. Carr*[110] criteria:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issues to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial

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108. *See* pp. 221-22 *infra* (discussing case).

109. In one case, moreover, the Supreme Court even applied norms of customary international law to declare illegal the American military seizure of two Cuban fishing boats during the Spanish American War. *See* The Paquete Habana, 175 U.S. 677 (1900). Since international obligations arising under a treaty are more obvious than those arising under "custom", it is argued in Comment, *Public Interest Litigation and United States Foreign Policy*, 18 HARV. INT'L L.J. 375, 417-18 (1977), that if the political question doctrine did not bar the application of custom in the absence of a treaty in *The Paquete Habana*, there is even less reason for courts to hesitate in holding federal officials to their binding responsibilities under a treaty. However, as Scharpf, *supra* note 36, at 575, emphasizes, the Court pointed out that the officer responsible for seizing the boats had acted without specific authorization from the Navy Department, and that the President had declared that the United States intended to abide by international rules and customs in its conduct of war. The decision can, therefore, be narrowly limited to these facts.

110. 369 U.S. 186 (1962).

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> discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[111]

With respect to the first *Baker* criterion, the issues of American treaty law raised by the seal skins case are not within any of the limited categories of treaty law the courts have designated as exclusively for executive determination. In view of the results in such cases as *Chew Heong v. United States*,[112] *Fourteen Diamond Rings v. United States*,[113] *Cook v. United States*,[114] and *Bacardi Corp. of America v. Domenech*,[115] the statement of the district court in *Dent* that "[i]t is not for the court to say whether a treaty has been broken or what remedy shall be given"[116] is simply not accurate.[117] Since the issues in *Dent* are also not exclusively for congressional determination, the case does not meet the first political question criterion under *Baker v. Carr*.[118]

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111. *Id.* at 217.

112. 112 U.S. 536 (1884).

113. 183 U.S. 176 (1901).

114. 288 U.S. 102, 114-20 (1933).

115. 311 U.S. 150 (1940).

116. *See* note 2 *supra*, 14 INT'L LEGAL MATERIALS at 804.

117. In support of its statement, the *Dent* court cited Z. & F. Assets Realization Corp., v. Hull, 31 F. Supp. 371 (D.D.C. 1940), *aff'd*, 114 F.2d 464 (2d Cir.), *aff'd on other grounds*, 311 U.S. 470 (1941). That case involved a challenge to the validity of certain awards, which the State Department had recognized, made by the Mixed Claims Commission established after World War I. The district court dismissed the challenge and the court of appeals affirmed on political question grounds, but the Supreme Court affirmed on statutory grounds. It is therefore inapposite to *Dent* for at least two reasons: (1) the Supreme Court did not treat it as a political question case and (2) in *Dent*, plaintiffs were asking the court to *uphold* rather than to reject a State Department position. *See* Comment, *supra* note 109, at 418 nn.162-63 (distinguishing cases).

118. 369 U.S. 186, 217 (1962). In any event, the thoughtful opinion of the district court in Atlee v. Laird, 347 F. Supp. 689, 703 (E.D. Pa. 1972), *aff'd sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973), concluded that in foreign policy cases where it is claimed that a political question is present, courts should focus their attention not on the first but on the other five *Baker* criteria.

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Neither does there seem to be a "lack of judicially discoverable and manageable standards for resolving" the case.[119] This second *Baker* criterion was the one presumably invoked by courts when they held the Vietnam War cases to be non-justiciable.[120] In the Namibian case, however, there would seem to be no such problem; on the contrary, the case law, treatises, and commentaries provide standards which are both "judicially discoverable and manageable for resolving" the issue of whether United Nations resolutions are binding under international and United States domestic law.[121]

Resolution of the Namibian case, furthermore, did not require "an initial policy determination of a kind clearly for nonjudicial discretion."[122] Although they disagreed on what the requirements of international law *were*, both the Commerce Department and the State Department (as well as the parties in the case) articulated the issues in *Dent* in terms of legality rather than of policy. Neither executive department claimed that in resolving the intra-executive dispute over American treaty obligations the court would encroach upon the executive's policy-making sphere.

The sixth *Baker* criterion for political question cases is "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[123] Whatever embarrassment could result from such multifarious pronouncements already existed as a result of the split between the State and Commerce Departments in *Dent*. Adjudication of the case would reduce rather than add to such embarrassment.[124] Instead of communicating any "lack of the

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119. Baker v. Carr, 369 U.S. 186, 217 (1962) (second criterion).

120. *See* pp. 186-88 *supra*.

121. *See, e.g.,* pp. 224-30 *infra* (citing cases); Higgins, *supra* note 7.

122. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (third criterion).

123. *See id.* (sixth criterion).

124. If the term "various departments" is construed as applying to *different branches* of government rather than *parts* of a single branch, of course, *Dent* completely fails to meet this criterion, since the dispute there was *intra*-branch rather than *inter*-branch.

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respect due coordinate branches of government,"[125] a court in agreeing to decide the case would only be serving its traditional dispute-resolving function.

Finally, in *Dent* there was no "unusual need for unquestioning adherence to a political decision already made."[126] President Ford, like Presidents Nixon and Carter, expressed at least qualified support for the United Nations' position on Namibia. The State Department repeatedly supported this decision.

The State Department, moreover, and not the Commerce Department, had the prerogative to decide United States policy concerning American treaty obligations under the United Nations Charter and Security Council resolutions.[127] The Commerce Department's decision-making process revealed that its initial position on the treaty issues concerning Namibia was merely incidental to its support for the Fouke waiver.[128] The result of such a process was scarcely entitled to the deference which might be merited by a reasoned and thorough decision by the State Department, which had the competence and the responsibility to decide such cases. In the absence of presidential intervention[129] to resolve such an intra-executive dispute, the Commerce Department, which had no special expertise in foreign relations, should have deferred to the State Department's opposing position. In the end, the State Department position on the Namibian seal skins prevailed without judicial intervention, but it would not have been inappropriate for judicial intervention to have contributed to such a result.

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125. Baker v. Carr, 369 U.S. 186, 217 (1962) (fourth criterion).

126. *Id.* (fifth criterion).

127. *See* p. 188 & note 94 *supra*.

128. *See* 24 U. KAN. L. REV. 395, 405 (1976).

129. Such intra-executive disputes are not uncommon, and the President sometimes permits them to continue without resolution. *Cf.* Hollick, *Bureaucrats at Sea*, in NEW ERA OF OCEAN POLITICS 1-73 (A Hollick & R. Osgood eds. 1974) (describing competing assertions of government interest in law of the sea). It seems unwarranted, however, to infer any covert presidential support for the Commerce Department's position from President Ford's failure to resolve the Namibian seals dispute.

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In summary, neither judicial precedents nor policy considerations supported the invoking of the political question doctrine in the Namibian case. This may explain why the court of appeals in *Diggs v. Richardson*,[130] while generally affirming the district court, did not affirm but rather omitted discussion of the district court's political question holding. Consequently, it appears that the Namibian case did not involve a political question, and that the political question doctrine should not bar the adjudication of plaintiffs' claims in the seal skins case or similar prospective litigation.

B. *Standing to Sue*

Standing requirements have, in recent years, thwarted many lawsuits oriented to the public interest. The doctrine of standing is a corollary of the constitutional provision authorizing courts to adjudicate only cases and controversies.[131] The core of the standing concept is that the plaintiff must have a genuine personal stake, not a generalized interest, in the resolution of the issues in controversy.[132] Only if a plaintiff has such a personal stake, the Supreme Court has stated, can there be assured "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[133]

As the flood of litigation has threatened to overwhelm the courts, the Burger Court has narrowed access by tightening standing requirements, partic-

130. 555 F.2d 848 (D.C. Cir. 1976).

131. See U.S. CONST. art. III, § 2, cl. 1.

132. *See* Warth v. Seldin, 422 U.S. 490, 498-99 (1975).

133. Baker v. Carr, 369 U.S. 186, 204 (1962). The standing rule is also based in part on consideration of the effects of *stare decisis*. Under this doctrine, the principles of law issuing from litigation may affect the future rights and interests of non-parties, although such non-parties have no right to intervene in the lawsuit. Standing requirements are imposed to protect such non-parties from inadequate presentation of a case or more serious abuses such as barratry, maintenance, and friendly suits.

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ularly for "public interest" plaintiffs.[134] Accordingly, the problem of standing might have posed a very serious obstacle to a court's adjudication of a suit involving Namibia brought by American citizens. Plaintiffs in *Diggs v. Dent*[135] had the advantage, however, of relying on *Diggs v. Shultz*,[136] a decision of the same circuit acknowledging plaintiffs' standing under quite similar circumstances. The plaintiffs in *Shultz* failed to achieve their principal objective, injunctive relief against the importation of Rhodesian chromite ore permitted by the Byrd Amendment. In denying this relief the court claimed that it had no power to nullify the Byrd Amendment, which plaintiffs contended was contrary to United States treaty obligations under the United Nations Charter.[137] Nevertheless, in affirming the district court's dismissal of the action, the court of appeals rejected the district court's conclusion that all the plaintiffs lacked standing.

In order to establish their standing to challenge the Byrd Amendment in a lawsuit against the United States government, plaintiffs in *Shultz* had to demonstrate that they had been injured by the Byrd Amendment. Plaintiffs argued that the Amendment, by limiting the effectiveness of the United Nations embargo directed at ending the Rhodesian policies which had caused them harm, deprived them of the embargo's potential benefits.

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134. *See, e.g.*, Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); United States v. Richardson, 418 U.S. 466 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Sierra Club v. Morton, 405 U.S. 727 (1972). This trend runs counter to some earlier cases which permitted "private Attorney Generals" to litigate on behalf of the public interest. *See, e.g.*, Associated Indus., Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *vacated*, 320 U.S. 707 (1943) (*per curiam*); Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 4, 14-15 (1942).

135. *See* note 2 *supra*.

136. 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

137. *See* pp. 257-70 *infra* (discussing treaty override).

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The district court found that appellants had been injured by the fact that two were natives of Rhodesia unable to return to their homeland, that six others (including four black congressmen) had been refused entry to Rhodesia, that others (missionaries of the United Church of Christ) had been arrested and deported from Rhodesia, and that another's books had been banned from sale in Rhodesia. The court concluded, however, that the causal relationship between Rhodesia's denial of rights to plaintiffs and their challenge of the Byrd Amendment was too attenuated to constitute the "logical nexus" required for standing.[138]

The court of appeals reversed this holding. The court acknowledged that appellants' "primary quarrel" was with Rhodesia,[139] but it stated that this did not foreclose the existence of a cognizable dispute between them and the United States. Significantly, it emphasized that plaintiffs lacked any recourse other than their lawsuit:

> It may be that the particular economic sanctions invoked against Southern Rhodesia in this instance will fall short of their goal, and that appellants will ultimately reap no benefit from them. But, to persons situated as are appellants, United Nations action constitutes the only hope; and they are personally aggrieved and injured by the dereliction of any member state which weakens the capacity of the world organization to make its policies meaningful.[140]

Plaintiffs' injury in *Diggs v. Dent*[141] was identical or similar to that in *Shultz*. Both Congressman Diggs and Executive Director George Houser of the American Committee on Africa had been denied entry to Namibia by the South African government.

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138. Diggs v. Shultz, 470 F.2d 461, 464 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

139. *Id.* at 465.

140. *Id.*

141. *See* note 2 *supra*.

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South Africa had outlawed the South West African People's Organization (SWAPO); many of SWAPO's members are refugees living abroad, and they and plaintiff Theo-Ben Gurirab, SWAPO's director and representative plenipotentiary to the United Nations, would be subject to arrest if they returned to Namibia. Because of these similarities, the district court in *Dent* found *Shultz* controlling and held that plaintiffs had standing. Judge Flannery stated that:

> [t]he factual similarity between *Diggs v. Shultz* and the case at bar is undeniable. As in *Diggs v. Shultz*, plaintiffs claim various personal injuries resulting from illegal actions of a foreign nation. Thus plaintiffs allege a sufficient personal interest in the controversy to insure concrete adverseness in the presentation of the issues. . . . United Nations Resolutions 276 and 301, like the Resolution in *Diggs v. Shultz*, attempt to deter a foreign government from activities which adversely affect plaintiffs by means of concerted international pressure. As a result, plaintiffs are arguably within the zone of interest sought to be protected by those Resolutions. . . . The only significant difference between the earlier case and the case at bar is that the embargo in *Diggs v. Shultz* had been made effective in this country by Executive Orders which imposed penalties upon persons who violated their directives. The Executive Orders were not apparently relevant, however, to the existence of standing and thus their absence in the present situation is insufficient to distinguish the two cases.[142]

The court of appeals in *Diggs v. Richardson*[143] affirmed the district court's dismissal in *Dent*, and it held that the United Nations resolutions at issue did not confer judicially enforceable rights on

142. *Id.*, 14 INT'L LEGAL MATERIALS at 802-03.
143. 555 F.2d 848 (D.C. Cir. 1976).

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plaintiffs. It referred to but declined to comment on defendants' argument that the holding with respect to standing in *Shultz* was unsound in light of subsequent Supreme Court decisions. Accordingly, the decisions on standing in *Dent* and *Shultz* remain intact, at least in the District of Columbia Circuit, and they should ease the way for future plaintiffs seeking enforcement of United Nations resolutions in American courts.

Attempts will no doubt be made by prospective government defendants, however, to limit narrowly the standing precedents of the *Diggs* cases. Because standing is largely dependent on the facts of the plaintiff's situation and his or her relationship to the legal interests he or she invokes, it is difficult to predict to what extent future plaintiffs who invoke United Nations resolutions will be able to rely on the favorable *Diggs* holdings to establish their standing. Thus, a broader discussion of recent cases on standing is necessary to shed light on the prospects for such future plaintiffs.

The litigation in the *Diggs* cases or similar prospective litigation involves the assertion of rights derived neither from the Constitution nor from a federal statute,[144] but from a treaty of the United States (the United Nations Charter).[145] None of the Supreme Court standing decisions deals with such a treaty claim. Nevertheless, although it may be true that "generalizations about standing to sue are largely worthless as such,"[146] it is

144. The Supreme Court has long recognized congressional power to confer standing on a class of plaintiffs by statute. *See* Associated Indus., Inc. v. Ickes, 134 F.2d 694 (2d Cir. 1943), *vacated*, 320 U.S. 707 (1943) (*per curiam*); Scott, *Standing in the Supreme Court - A Functional Analysis*, 86 HARV. L. REV. 645, 647-48 (1973).

145. *But see* Comment, *supra* note 109, at 405 (arguing that Security Council resolutions and relevant United Nations Charter provisions in *Dent* constitute "legislative action" to which American courts should give cognizance).

146. Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 151 (1970).

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likely that the Court would be guided by its recent decisions involving constitutional and statutory claims in assessing plaintiffs' standing to enforce United Nations resolutions. Treaties are on a par with statutes insofar as their legal effect is concerned;[147] there is no obvious reason for distinguishing the standing of a plaintiff invoking a treaty from that of one invoking a statute.

It has become customary when beginning a discussion of the doctrine of standing to note the confusion which prevails in this area of the law.[148] Not only has the Supreme Court applied a number of different standards in its recent major decisions in this area, but it has not overruled prior cases on standing.[149] Consequently, various standards coexist in the law for deciding the issue of standing. These standards, moreover, are unanchored to specific subject areas and are ready to be invoked by the Supreme Court whenever a specific result is desired. The application of the holdings is elastic: it seems that they can be expanded or restricted to suit the needs of a new case and the predilections of the majority of the Court.[150]

There are two basic requirements for standing relevant to the seal skins case: plaintiffs must show that they have suffered an injury and that there is a logical nexus between their grievance and the claim they seek to have adjudicated. As noted above, plaintiffs in *Shultz* and *Dent* could convincingly claim to have suffered "injury in fact."[151]

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147. DuPree v. United States, 559 F.2d 1151, 1154 (9th Cir. 1977) ("Presumably treaty and international conventions being on the same footing as legislative enactments may serve the same function in affording standing.")

148. *See, e.g.,* Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 66 n.13 (1976) (Brennan, J., dissenting); Note, *Standing to Assert Constitutional Jus Tertii,* 88 HARV. L. REV. 423 (1974).

149. *See, e.g.,* Flast v. Cohen, 392 U.S. 83 (1968); Frothingham v. Mellon, 262 U.S. 447 (1923).

150. *See, e.g.,* Linda R. S. v. Richard D., 410 U.S. 614, 617, 619 (1973); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).

151. *See* United States v. SCRAP, 412 U.S. 659, 686 (1973) ("injury in fact" requirement for standing); Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 152 (1970) (same).

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Proof of a "logical nexus between the status asserted and the claim sought to be adjudicated,"[152] however, is more difficult. Just as the district court in *Shultz* found that the causal relationship between Rhodesia's denial of the plaintiffs' rights and the plaintiffs' challenge of the Byrd Amendment was too attenuated to constitute such a nexus,[153] it could be argued that plaintiffs in *Dent* had a grievance only against the South African authorities rather than against United States officials who were considering waiver of the MMPA to permit importation of seal skins from Namibia.

Recent Supreme Court decisions cast doubt on whether the Court in future attempts to enforce United Nations policies would recognize the nexus of injury and claim found in *Shultz* and *Dent*. The Court has stated that although it does not foreclose standing, indirectness of injury "may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm."[154] The Court in several cases has denied standing when it concluded that the relationship between plaintiffs' alleged injuries and defendants' actions was speculative.

For example, the Supreme Court in *Warth v. Seldin*[155] denied standing to low-income plaintiffs challenging a town's restrictive zoning ordinance which virtually restricted housing to single family units.[156] The Court determined that plaintiffs had failed to show that their failure to obtain adequate housing was attributable to the zoning ordinance rather than to other factors such as their low income. Similarly, in *Linda R.S. v. Richard D.*[157] the mother of an illegitimate child contended, in a suit against the state of Texas and the father, that it was discriminatory for a criminal statute penalizing non-support by parents to be enforced only against parents of legitimate children.[158] Because

152. Flast v. Cohen, 392 U.S. 83, 102 (1967).
153. 460 F.2d 461, 464 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).
154. Warth v. Seldin, 422 U.S. 490, 505 (1975).
155. *Id.*
156. *Id.* at 518.
157. 410 U.S. 614 (1973).
158. *Id.* at 615-16.

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the child's father might have chosen incarceration rather than paying support and plaintiff was thus unable to show that her failure to obtain child support resulted from the state's nonenforcement of the criminal statute, the Court held that plaintiff lacked standing.

Finally, in *Simon v. Eastern Kentucky Welfare Rights Organization,*[159] the Court denied standing to indigents and associations of indigents who claimed that a revised Internal Revenue Service ruling lowered the level of service hospitals were required to provide indigents in order to qualify for tax exemption as charitable organizations and thereby contributed to plaintiffs' exclusion from hospital emergency rooms. The Court found that "speculative inferences [were] necessary to connect [respondents'] injury to the challenged actions of petitioners."[160]

Applying the above principles to the Namibian case, it seems inescapable that the asserted injury, however characterized, was at best only an indirect result of the action or inaction of the United States government. Plaintiffs' exclusion from Namibia (or inability to return there) was not the consequence of the Commerce Department's intention to authorize importation of the seal skins. There was little likelihood, moreover, that the prospective relief, denial of the waiver, would remove the harm and cause the South African authorities to permit plaintiffs to visit Namibia. South Africa would suffer little economic harm were it unable to export seal skins to the United States. The South African government has steadfastly maintained its policies against far greater international pressures in other areas.

To meet the standards of the above cases, the plaintiffs' injury must be characterized as an injury caused by the United States government, namely, the government's failure to abide by the obligations created by Security Council resolutions voted under the United Nations Charter, a United States treaty. The attenuated nature of such an asserted interest, particularly if it is abstracted from plaintiffs' exclusion from Namibia, is

159. 426 U.S. 26 (1976).
160. *Id.* at 45 (footnote omitted).

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obvious. If their exclusion from Namibia is considered, plaintiffs would no doubt be within the "zone of interests" the Security Council resolution on Namibia intended to protect.[161] But if plaintiffs claim standing only on the basis of their interest in enforcing the law and in requiring the United States to abide by its treaty obligations under the Charter, the Supreme Court would probably reject their claim as an attempt "to employ a federal court as a forum in which to air [their] generalized grievances about the conduct of government."[162]

Exclusion from Namibia and plaintiffs' interest in enforcing the law must be combined in order to fashion an argument for plaintiffs' standing.[163] Accordingly, to increase the likelihood of clearing the threshold barriers in litigation seeking to enforce United Nations resolutions on Namibia in American courts, plaintiffs should be

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161. *See* Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 153 (1970) (requiring plaintiffs, in order to invoke statute, to be within "zone of interests" intended to be protected by statute).

162. Flast v. Cohen, 392 U.S. 83, 106 (1968).

163. There is no congressional enactment involved in the Namibian case under which plaintiff Congressman Diggs could invoke special standing as a legislator. In Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), the court held that Senator Kennedy had standing to challenge President Nixon's use of the "pocket veto," because this would dilute the power of his vote. Several other attempts by congressmen to claim special standing by virtue of their legislative role, however, have been rejected by the courts. *See, e.g.*, Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977) (a challenge to CIA funding); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975) (a challenge to war expenditures). Congressman Diggs claimed and was accorded standing in *Shultz*, *Dent*, and *Richardson* on the grounds that he had been denied admission to Namibia, and not because of his congressional status.

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selected who can claim to represent the people of Namibia themselves. The Council for Namibia, the internationally-recognized representative of the territory's population, has shown no inclination to bring such actions.[164] On the other hand, SWAPO, which claims the loyalty of a large fraction of the inhabitants of Namibia, and Theo-Ben Gurirab, SWAPO's representative to the United Nations, were plaintiffs in *Dent*.

In addition to selecting plaintiffs who represent the Namibian people, it is important to redefine the nature of plaintiffs' grievance as official United States action which lends legitimacy to the South African regime in Namibia. This injury might appear slight but the causal nexus between it and the challenged United States action would be direct and obvious. One strong reason for courts to allow such vindication of the rights and interests of Namibian inhabitants is the fact that South African subjugation

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164. If it wished to sue, the United Nations Council for Namibia would probably be in the strongest position to gain standing to defend Namibian interests and to enforce Security Council resolutions on Namibia in American courts. The Council was created by the United Nations for the express purpose of defending Namibian interests and of exercising authority over the territory until such time as the territory gains self-rule. *See* Shockey, *Enforcement in United States Courts of the United Nations Council for Namibia's Decree on Natural Resources*, 2 YALE STUDIES IN WORLD PUBLIC ORDER 285, 304-11 (1976) (arguing that the Council for Namibia could serve as plaintiff).

Foreign governments have traditionally been granted standing to sue in American courts as a matter of comity; this right, however, is not extended to governments which the United States does not recognize. *See* Pfizer, Inc. v. India, 434 U.S. 308 (1978); United States v. Sabbatino, 376 U.S. 398 (1964); Lubman, *The Unrecognized Government in American Courts: Upright v. Mercury Business Machines*, 62 COLUM. L. REV. 275 (1962).

The United States has taken a rather complex position on the authority of the Council for Namibia. It has consistently maintained that South African administration over the territory is illegal and should be replaced by that of the Council, but it has interpreted the resolution establishing the Council to mean that it can only exercise its authority once it is physically present in Namibia. *See* Shockey, *supra*, at 303; note 309 *infra*. Consequently, it is debatable whether the Council would be treated as a recognized government entitled to standing to sue in American courts.

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deprives the Namibians of the very entity which would normally be expected to defend their interests in international litigation, an independent government. The right to self-determination and the related vital interests of the Namibian people, after all, are what is really at stake in the Namibian case, and not the exclusion of a few individuals from that territory.

It is not unprecedented to allow plaintiffs to invoke the rights of third parties.[165] The Supreme Court has acknowledged this right in various cases. In the most famous of these cases, *Pierce v. Society of Sisters,*[166] the Court held that a religious congregation which operated parochial schools had standing to vindicate the constitutional rights of parents whose children were prohibited by state statute from attending the schools. In *Barrows v. Jackson,*[167] the Court held that a white home-owner had standing to invoke the constitutional rights of potential non-white purchasers in defending an action for breaking a racially restrictive covenant. In several recent cases, the Court has acknowledged the standing of doctors to invoke the constitutional right of privacy of third persons in actions challenging state laws which prohibited the distribution of contraceptive devices and information about abortion.[168] Furthermore, the Court in *NAACP v. Alabama*[169] permitted a civil rights organization which refused to release its membership lists to a state agency to invoke its members' constitutional right of assembly under the due process clause.[170]

Such decisions are exceptions to the Supreme Court's general rule that "[o]rdinarily, one may

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165. *See, e.g.,* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599 (1962); Annotation, *Supreme Court's Views as to Party's Standing to Assert Rights of Third Persons (Jus Tertii) in Challenging Constitutionality of Legislation,* 50 L.Ed. 2d 902 (1978).

166. 268 U.S. 510 (1925).

167. 346 U.S. 249 (1953).

168. *See, e.g.,* Singleton v. Wulff, 428 U.S. 106 (1976); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Griswold v. Connecticut, 381 U.S. 479 (1965). *But see* Tileston v. Ullman, 318 U.S. 44 (1943) (doctor denied standing).

169. 357 U.S. 449 (1958).

170. U.S. CONST. amend. XIV, § 1, cl. 2.

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not claim standing in this Court to vindicate the constitutional rights of some third party."[171] It is settled, however, that "limitations on a litigant's assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative."[172]

All of the cases discussed above, however, involved invocation of constitutional rights of individuals by third parties. Thus, a major difficulty which would confront plaintiffs seeking to assert the rights and interests of the Namibian people is that no constitutional claim is involved in their case. Nevertheless, the prudential principles which led to a grant of standing in *Society of Sisters* and *Jackson* are relevant to the situation of the Namibian population. The Court in *Jackson* held that the general rule against permitting the assertion of jus tertii claims was outweighed by "the need to protect [these] fundamental rights" in circumstances "in which it would be difficult if not impossible for persons whose rights are asserted to present their grievance before any court."[173] It is not difficult to imagine the reprisals to which an inhabitant of Namibia might be subject for bringing an action in an American court to challenge either directly or indirectly South African rule over his homeland. If surrogates are not permitted to represent the rights of Namibians in American courts, it is unlikely that anyone will be able to defend these rights.

The Supreme Court has held that a similar argument provides no basis for standing:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of

171. Barrows v. Jackson, 346 U.S. 249, 255 (1953).
172. Craig v. Boren, 429 U.S. 190, 193 (1976).
173. 346 U.S. 249, 257 (1953).

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> Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.[174]

This stricture, however, should be limited to domestic political issues, which are susceptible to political change by those whose interests are at stake. The Namibians, on the other hand, have no elected representative in Congress or the executive. Nevertheless, their vital interests are affected by the question of whether the United States complies with its putative treaty obligations to Namibia under the United Nations Charter. In their case, the prudential considerations which militate against permitting plaintiffs judicial review where more appropriate political redress is available do not obtain. Thus, the Namibian litigation or similar prospective efforts to enforce United Nations resolutions as treaty obligations of the United States illustrate the kind of exceptional situations, like that in *Baker v. Carr*,[175] in which standing to sue is warranted despite the general prudential considerations to the contrary.

It will be difficult, in light of recent Supreme Court standing cases, for future litigants like those in the *Diggs* cases to gain standing to sue. Indeed, it seems unlikely that the present Court would approve standing in the *Diggs* cases if it reviewed the question today. All the leading Supreme Court cases, however, deal with standing to raise questions of statutory and constitutional law. These decisions, therefore, do not directly preclude a grant of standing in an action to enforce United States treaty obligations. The vigorous dissents of Justices Brennan and Marshall indicate, moreover, that the Court's tightening of the standing doctrine has not mustered total support and it is conceivable that a future Court might relax standing rules. Finally,

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174. United States v. Richardson, 418 U.S. 166, 179 (1974).

175. 369 U.S. 186 (1962).

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plaintiffs like those in the *Diggs* cases could claim extraordinary political circumstances to justify relaxation of the traditional standing requirements. In any event, the holdings on standing in *Shultz* and *Richardson* have not been overruled or disapproved by other courts and future plaintiffs seeking the enforcement of United Nations resolutions will probably use them to good effect in clearing the threshold barriers to litigation and gaining a hearing on the merits.

II. The Substantive Issues

This part of the article considers the substantive legal issues raised by the question whether the United Nations resolutions invoked by the plaintiffs in the seal skins case are binding as a matter of United States domestic law. These are issues of American treaty law, because plaintiffs' claims that these resolutions should be enforced are based on the fact that the United Nations Charter is a treaty of the United States. As noted previously, this question encompasses the following substantive legal issues: whether United Nations member states are obligated to comply with Security Council resolutions; whether the United Nations Charter and Security Council resolutions constitute international legal obligations of the United States; whether the United States recognizes any such obligations as a matter of United States domestic law; and whether the Charter and Security Council resolutions are self-executing treaties under American law, or, if not, whether they have been "executed."

A. *Obligations of United Nations Member States under International Law*

In order to bind the United States legally, a Security Council resolution must first be binding on all member states under the United Nations

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Charter.[176] Accordingly, the first question which arises in determining whether Security Council resolutions on Namibia are binding on the United States is whether in general members states are obligated to comply with Security Council resolutions.

The Security Council has the status of an executive body whose specific powers are enumerated in the Charter. Chapter V (Articles 23-32) specifies the composition, duties, and powers of the Council. Article 25 states:

> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.[177]

Article 24 provides, in pertinent part:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.[178]

Chapter VI (Articles 33-38), "Pacific Settlement of Disputes," authorizes the Security Council to seek solutions to international disputes through negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, and other means.[179] Chapter VII

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176. Although it is generally held that the United Nations Charter is not binding on non-member states, the Charter is one of the sources of customary international law. *See* McNeill, *Regional Enforcement Action Under the United Nations Charter and Constraints Upon States Not Members,* 9 CORNELL INT'L L.J. 1, 4-6 (1975).

177. U.N. CHARTER art. 25.

178. U.N. CHARTER art. 24(1).

179. The other means include "resort to regional agencies or arrangements, or other peaceful means of [states'] own choice U.N. CHARTER art. 33(1). Art. 36(3) states that "the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with provisions of the Statute of the Court."

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(Articles 39-51), "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," empowers the Security Council to call for sanctions or military force to protect international peace and security when it is endangered.[180]

The question whether Security Council resolutions are binding on member states or merely hortatory has engendered considerable controversy. In its Advisory Opinion of 1971 on Namibia, the International Court of Justice ruled that Security Council Resolution 276 concerning Namibia was binding on member states even though it had not been issued under the authority of Chapter VII of the Charter.[181] After careful study of the Charter and its history, numerous scholars have concluded that the Court was correct in its view that Article 25's provision making Security Council resolutions binding on member states applied not only to emergency measures taken under Chapter VII, but also to the broad authority conferred on the Security Council by Article 24.[182]

Other authorities, however, have adopted the view that Article 25 applies only to "decisions" taken under Chapter VII[183] and not to resolutions passed pursuant to Chapter VI, and State Department spokesmen

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180. The United Nations sanctions against Rhodesia, upon which Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973), was based, were adopted specifically under the authority of Chapter VII of the Charter. Security Council Resolution 232 was the first instance in which mandatory sanctions had been voted under Chapter VII. *See* Note, *supra* note 7, at 92; note 290 *infra*.

181. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, 52-53 [hereinafter cited as Namibia Advisory Opinion]. *See* note 266 *infra* (quoting Resolution 276).

182. *See, e.g.*, Higgins, *supra* note 7, at 286; Sohn, *The Development of the Charter of the United Nations: The Present State*, in THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 39, 55-57 (Bos ed. 1973); Note, *Self-Execution of United Nations Security Council Resolutions under United States Law*, 24 U.C.L.A. L. REV. 387, 402-03 (1977).

183. *See, e.g.*, Dugard, *Namibia (South West Africa): The Court's Opinion, South Africa's Response, and Prospects for the Future*, 11 COLUM. J. TRANSNAT'L L. 14, 31-32 (1972). *Cf.* Rovine, *The World Court Opinion on Namibia*, 11 COLUM. J. TRANSNAT'L L. 203, 226-30 (1972) (criticizing the failure of the International Court of Justice to explicate the relation between Security Council resolutions on Namibia and Chapter VII of the Charter).

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have taken this approach in recent years.[184] One of the ramifications of this position, which may explain why the executive has adopted it, is that a real danger of international conflict would be required before the effect of Security Council resolutions could be deemed binding upon American courts.[185]

The United Nations resolutions concerning Namibia were taken under authority granted in Chapter VI. The position of litigants seeking to enforce these Security Council resolutions in American courts would be stronger if it were clear and undisputed that Article 25 applied to Chapter VI. There are no reported holdings by American courts on this question,

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184. The Deputy Legal Adviser of the Department of State, for instance, took the following position in a letter sent to the Justice Department attorney in Diggs v. Richardson, 555 F.2d 848 D.C. Cir. 1976), during the litigation of the case:

> Since the Namibia resolutions of the Security Council neither invoked the Council's mandatory authority under Chapter VII of the Charter nor indicated an intention to be legally binding, the United States would not regard those resolutions as having automatic binding force. This is one reason why, in our explanation of [the] vote on Resolution 301, we stated that we accepted the conclusions of the Advisory Opinion [of the International Court of Justice] but not necessarily all of the reasoning.

Letter from George H. Aldrich to Bruno A. Ristau (Nov. 3, 1975), *reprinted in* E. McDowell, *supra* note 3, at 89.

185. The belief that no real danger was actually present was the reason given by the United States for its veto of the proposed Security Council resolution of June 6, 1975, imposing a mandatory arms embargo on South Africa. *See* 73 DEP'T STATE BULL. 44 (1975). In view of the violence in neighboring Rhodesia, the Cuban military involvement in Angola, and South African resistance to the United Nations plan for Namibia, the danger of such a conflict seems less remote at present.

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however, and the State Department view, although it is entitled to deference, is not conclusive upon the courts. Accordingly, the above-cited international law authorities give Namibian litigants a strong basis for arguing that Security Council Resolution 301 is binding on member states under the Charter.

B. *Obligations of the United States under International Law*

A necessary although not sufficient precondition to the enforcement of Security Council resolutions on Namibia in American courts is that the resolutions be adjudged to constitute international legal obligations of the United States. The United Nations Charter is a treaty of the United States and by ratifying it, the United States plainly subjected itself to the international legal responsibilities imposed by resolutions passed pursuant to the Charter.[186] Thus the court of appeals in *Diggs v.*

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186. Article 2(2) of the Charter provides:

> All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

And Article 2(5) of the Charter provides:

> All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

It has been argued that:

> [e]ven those recommendations of the General Assembly and the Security Council which cannot be considered binding . . . may nevertheless have certain important effects. A Member of the United Nations would not be fulfilling in good faith its obligations under the Charter, if it were simply to ignore such recommendations, without adducing any plausible reasons for not giving effect to them. . . . a resolution recommending 'a specific course of action creates *some*

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Shultz[187] recognized that the Charter and Security Council Resolution 232 created international legal obligations for the United States.[188] Moreover, the generally favorable attitude of the executive branch, particularly of the State Department, toward the official United Nations position on Namibia makes it unlikely that the courts would balk in future cases at concluding that resolutions on Namibia do in fact constitute United States international treaty obligations.

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186 (Continued)

> legal obligation', however 'rudimentary, elastic and imperfect' it might be.

Sohn, *supra* note 182, at 57 (quoting Belaunde, Peruvian spokesman at the United Nations).

187. 470 F.2d 461 (D. C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

188. The court, however, held these obligations judicially unenforceable because Congress had abrogated them by passing the Byrd Amendment. *See* pp. 261-62 *infra*. In its consideration of their binding effect under United States domestic law, the court did not differentiate between the legal status of the United States treaty itself (the Charter) and that of the actions or declarations of the body it created (Security Council Resolution 232, in this case). Instead, "[t]he court, without explanation, assumed that a resolution could be a treaty commitment of the United States binding on domestic courts even though it was clearly not part of the original charter which is the operative treaty." Note, *supra* note 7, at 85. This previously cited Note, however, concurs with the court's implicit assumption that a mandatory Security Council resolution has domestic force because it is "an extension of a treaty." *Id.* at 84 n.9. This conclusion derives strong support from the fact that the United States' veto power gives it the ability to block passage of any Security Council resolution with which it does not agree. Failure of the United States to exercise the veto, and *a fortiori* its vote in favor of a resolution (as in the case of Resolutions 232 on Rhodesia and 276 and 301 on Namibia), appear to manifest an intention on the part of the United States to incur binding treaty obligations under the resolution in question. Because of the power of United States delegates to pass on Security Council resolutions, those which the United States ratifies have been considered as equivalent to executive agreements with the same binding force as such agreements. Note, *supra* note 182, at 405.

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C. *Obligations of the United States under Domestic Law*

As *Diggs v. Shultz*[189] demonstrates, however, mere acknowledgment by a court that a treaty provision vision constitutes an international legal obligation of the United States does not ensure that the court will enforce or give effect to such a provision. To assess its enforceability, reference must be made to principles of domestic treaty law which grow out of the constitutional scheme.

Article VI of the Constitution governs the status of treaties under American law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .[190]

This clause establishes no order of priority between treaties and statutes of the United States, both of which, together with the Constitution, are "the supreme Law of the Land." The courts have accordingly ruled that treaties are on the same level as federal statutes, neither higher nor lower in legal force and effect.[191]

Purported United States treaty obligations have often been challenged, and courts have had to decide whether to honor them. The historic case of *Foster & Elam v. Neilson*[192] qualified the controlling force of treaties in a manner which the federal courts have since followed.

The central question in *Foster & Elam* was whether a treaty provision should be given effect without implementing legislation. Chief Justice Marshall's opinion held that some treaties do not become effective until they are implemented by the legislative branch:

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189. 470 F.2d 461 (D.C. Cir. 1972), *cert. denied,* 411 U.S. 931 (1973).

190. U.S. CONST. art. VI, § 2.

191. *See, e.g.,* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 600 (1899).

192. 27 U. S. (2 Pet.) 253 (1829); *see* note 47 *supra.*

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> Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[193]

In elaboration of Marshall's principle, the doctrine has developed that only the first group, those treaties which operate of themselves without the need for legislative implementation, are binding on the United States by virtue of Senate ratification. These are known as "self-executing" treaties, enforceable by the courts without implementing legislation. The second group of treaties are not inherently binding and can remain inoperative in the absence of implementing legislation. Litigants seeking to enforce Security Council resolutions in American courts must consequently anticipate the argument that the resolutions do not establish self-executing treaty obligations. They must be prepared to argue that the resolutions do fulfill the criteria for determining what constitutes a self-executing treaty, or, alternatively, that the resolutions have been executed.

In the century and a half since Chief Justice Marshall opened the "loophole" in *Foster & Elam,* construing only some treaties as self-executing, the federal courts have enshrined this principle firmly in precedent. The courts, however, have not developed from it clear rules for assessing the effect of specific treaties: "The self-execution question is perhaps one of the most confounding in treaty law. 'Theoretically a self-executing and an executory provision should be readily distinguishable. In

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193. Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

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practice it is difficult.'"[194] No one criterion is conclusive in assessing whether a treaty is self-executing. Moreover, many of the court decisions are irreconcilable.[195]

Nevertheless, two principles of the self-executing treaty doctrine can be elicited from the case law. First, the courts have maintained a distinction between general international law objectives and domestically enforceable rights.[196] The self-executing

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194. United States v. Postal, 589 F.2d 862, 876 (5th. Cir. 1979) (citation and footnote omitted); *cf.* Comment, *Criteria for Self-Executing Treaties*, 1968 U. ILL. L.F. 238, 247 (1968) (characterizing the International Convention for the Protection of Industrial Property) ("[T]he Convention's history indicates that the criteria used to determine whether a treaty establishes judicially enforceable rules are too elusive to produce any kind of uniformity. The formulas are meaningless in the abstract, and when applied to a particular treaty they are too vague for judicial guidance."). In *Postal*, plaintiffs had been convicted of conspiring to import marijuana into the United States after their sailboat was apprehended by the Coast Guard off the Florida Keys. On appeal, plaintiffs claimed that the court lacked jurisdiction since they had been seized beyond United States territorial waters. Their vessel was registered in the Grand Cayman Islands, and article VI of the Convention on the High Seas provided that ships should be subject to the exclusive jurisdiction of their country of registry while on the high seas. The court considered the following factors in reaching its conclusion that the Convention's article was not self-executing: the historical policy of the United States, with which plaintiffs' claims conflicted; the legislative history of the Convention, including statements by the United States delegate to the 1958 Law of the Sea Conference; and the failure of the Grand Cayman Islands government to protest the seizure. *See* United States v. Postal, *supra*, at 878-84.

195. *Id.* at 244 nn.26-27 (citing cases).

196. *See, e.g.*, United States v. Vargas, 370 F. Supp. 908 (D.P.R. 1974); Sei Fujii v. State, 38 Cal.2d 718, 722, 242 P.2d 617, 621 (1952).

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treaty doctrine has made it possible for the United States to subscribe to generally normative international law principles without making itself immediately answerable for the practical application of these principles. Second, the self-executing treaty doctrine, like the political question doctrine, has been used to safeguard the constitutional separation of powers.[197]

Application of the first principle requires an examination of whether a treaty and its history evidence an intention on the part of the signatories to confer judicially enforceable rights on individual parties; specifically, the United States must have intended that a treaty operate as an internal act without further legislative action. Therefore, in determining whether a treaty is self-executing, courts generally have given important weight to the intentions of the signatories.[198]

In some exceptional cases, a statement in the treaty itself indicates the intention of the signatories.[199] Thus, courts readily attribute present effect to a negative stipulation, since it clearly rules out certain action by the signatories.[200] *Culver v. Secretary of the Air Force*,[201] for instance, involved a treaty provision which declared that it was "'the duty'" of American troops in NATO countries "'to abstain from any activities inconsistent with the spirit of the present Agreement, and, in particular, from any political activity in the receiving --

197. *See, e.g.*, Turner v. American Baptist Missionary Union, 24 F. Cas. 344, 345-46 (C.C. Mich. 1852) (No. 14,251) (treaty requiring appropriations held non-self-executing because art. I, § 7 cl. 1 of the Constitution reserves the origination of appropriations bills to the House of Representatives).

198. *See, e.g.*, Comment, *supra* note 194, at 240; Note, *Security Council Resolutions: When Do They Give Rise to Enforceable Legal Rights? The United Nations Charter, the Byrd Amendment, and a Self-Executing Treaty Analysis*, 9 CORNELL INT'L L.J. 298, 300 (1976) [hereinafter cited as *Security Council Resolutions and Enforceable Legal Rights*]; Note, *supra* note 7, at 101.

199. 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 309-10 (1970).

200. *See* Note, *supra* note 182, at 395 (citing cases).

201. 559 F.2d 622 (D.C. Cir. 1977).

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state.'"[202] The plaintiff, an Air Force captain stationed in Germany, challenged the constitutionality of an Air Force regulation prohibiting political activity by servicemen while abroad. Although the self-executing treaty issue apparently was not litigated, the court of appeals evidently presumed that this treaty provision was self-executing since it based its dismissal of plaintiff's claim on the provision.

In most cases, however, the intention of the signatories as to whether the treaty should be self-executing or non-self-executing is not manifest and can be inferred only from the text of the document and the circumstances surrounding its origin. As with many exercises in legal construction, a variety of approaches are possible and the result is rarely obvious. It is easier, furthermore, to specify what *is not* a self-executing treaty provision than to say what *is* one; indeed, any treaty provision that does not fall into any of several categories is likely to be held self-executing.

Perhaps the most obvious instance of a treaty provision not intended to confer immediately enforceable legal rights is one which manifestly envisions or is contingent upon future implementation. The Court in *Foster & Elam v. Neilson,*[203] for instance, held that a treaty text providing that Spanish land grants "shall be ratified and confirmed" after United States annexation was not self-executing because Congress had not acted to ratify the grants.[204] A

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202. *Id.* at 628 n.8 (citing The Status-of-Forces Treaty (1951), 4 U.S.T. 1792, T.I.A.S. No. 2486, Art. II, at 1796).

203. 27 U.S. (2 Pet.) 253 (1829).

204. On the strength of a second translation from the Spanish text of the treaty providing that the land grants in question "'*shall remain* ratified and confirmed'" *Foster & Elam* was later overruled in United States v. Percheman, 32 U.S. (7 Pet.) 51, 88 (1833) (emphasis added). *See* note 47 *supra.*

This history illustrates the essentially semantic nature of deciding whether a treaty is self-executing. The meaning of treaty terms is often ambiguous: "shall", for instance, has one meaning which signifies the future tense, implying non-self-execution, and another which signifies a command or self-execution. Generally, any verb in the future tense is read to indicate that a treaty involves a contractual commitment to take subsequent action. *See Self-Executing Treaties and the Human Rights Provisions of the United Nations Charter: A Separation of Powers Problem,* 25 BUFFALO L. REV. 773, 777 (1976) [hereinafter cited as *Self-Executing Treaties*].

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treaty between two states to take mutual legislative action, similarly, is non-self-executing because it indicates that both signatories intended that its effectiveness depend on legislative implementation.[205]

Finally, provisions which endorse broad, general, long-range humanitarian goals rather than confer immediately enforceable individual rights are generally viewed as non-self-executing. Courts have generally been unwilling to conclude that United States treaties endorsing, in general terms, peaceful approaches to the resolution of international disputes were intended without legislative implementation to bar the future conduct of war and related activities by the government. In *Hamilton v. Regents of University of California*,[206] for instance, the Supreme Court upheld the dismissal of a complaint which argued that a California law requiring university students to take a course in military tactics violated the Kellogg-Briand Pact.[207] The Fifth Circuit in *Simmons v. United States*[208] rejected the appellant's claim that United States participation in the Vietnam War violated various treaties and articles of the United Nations Charter.[209] Similarly, the Second Circuit held in *Dreyfus v. Von Finck*[210] that the Hague Convention on War, the Kellogg-Briand Pact, the Treaty of Versailles, and the Four Power Occupation Agreement were not self-executing and did not confer on plaintiff the right to litigate in American courts for the return of property confiscated by Nazi authorities when he lived in Germany during the war.[211]

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205. *See, e.g.*, Note, *supra* note 7, at 103-04; Comment, *supra* note 109, at 387-98.

206. 293 U.S. 245 (1934).

207. *Id.* at 265.

208. 406 F.2d 456 (5th Cir. 1969).

209. *Id.* at 460 (U.N. CHARTER arts. 2(4) and 33(1)).

210. 534 F.2d 24 (2d Cir. 1976).

211. *Id.* at 30-31. Even if these treaties had been held to be self-executing, of course, there is some question whether they would have conferred a right of action on the plaintiff, because the court further held that a violation of international law does not occur "when the aggrieved parties are nationals of the acting state." *Id.* at 31. Application of such a principle might cause problems to potential Namibian plaintiffs were it not for the almost unanimous view that South Africa's continued occupation of Namibia is in violation of international law; therefore, South Africa's actions in Namibia are not immune from challenge by native Namibian plaintiffs on the grounds that such plaintiffs were nationals of the acting state.

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Treaty provisions not vulnerable to any of the previously discussed challenges, on the other hand, are likely to be held self-executing. This is particularly true if their terms appear precise and specific enough to obviate the need for subsequent implementation.[212] *Ex parte Toscano*[213] furnishes an illustration. During a civil war in Mexico, a Mexican armed force crossed the border into the United States. Article XI of the 1907 Hague Convention on the rights and duties of neutral powers in wartime provided that "'[a] neutral power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theater of war.'"[214] The district court in *Toscano* ordered the Mexican soldiers interned under the authority of the Hague Convention even though Congress had passed no act implementing the Convention.

Asakura v. Seattle[215] involved a challenge to a municipal ordinance denying aliens the right to be licensed as pawnbrokers. The Japanese plaintiff contended that the ordinance violated a Treaty of 1911 between the United States and Japan, which provided in part that American citizens and Japanese subjects had the right to reside in the other country and "'to carry on trade, wholesale and retail . . . and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.'"[216] Finding that pawnbroking constituted a "trade" permitted to citizens under Washington state law, the Supreme Court held the treaty self-executing and struck down the ordinance.

In *Bacardi Corp. of America v. Domenech*[217] the Court held that the General Inter-American Convention for Trademark and Commercial Protection was self-

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212. It is reasonable to assume that inclusion in a treaty of detailed and specific terms of the sort usually found in implementing legislation evidences the signatories' intention that the treaty take effect without implementing legislation.

213. 208 F. 938 (S.D. Cal. 1913).

214. *Id.* at 940 (citing art. XI of the Hague Convention).

215. 265 U.S. 332 (1924).

216. *Id.* at 340 (citing provision of Treaty of 1911).

217. 311 U.S. 150 (1940).

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executing; consequently, the court invalidated a Puerto Rican statute. The statute, which prohibited the marketing of alcoholic beverages under a trademark used previously outside Puerto Rico, was apparently designed with the specific purpose of blocking the Bacardi Corporation from entering the Puerto Rican Market.[218] The Trademark treaty, on the other hand, provided that "'[e]very mark duly registered or legally protected in one of the Contracting States shall be admitted to registration or deposit and legally protected in the other Contracting States, upon compliance with the formal provisions of the domestic law of such States.'"[219] The Supreme Court found that the Puerto Rican statute discriminated against foreign trademarks, and therefore it invalidated the statute on the grounds that it was incompatible with the treaty's protection of such trademarks.[220]

The second broad principle of the self-executing treaty doctrine, as noted previously,[221] is to safeguard the constitutional separation of powers. Its application in this sphere is governed by principles similar to those underlying the political question doctrine and in a sense is part of that doctrine. The separation of powers most obviously dictates that a treaty not be self-executing when the Constitution has specifically assigned exclusive responsibility for handling a treaty issue to the legislative branch. Thus a treaty requiring appropriations for its implementation is not self-executing, because Article I of the Constitution provides that appropriations bills must originate in the House of Representatives.[222]

Treaties dealing with the disposition of government property, on the other hand, are not subject to the same kind of constitutional limitation. In *Edwards v. Carter*,[223] sixty members of the House of Representa-

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218. *Id.* at 156.

219. *Id.* at 160 n.9 (citing art. III of Convention).

220. *Id.* at 164-66.

221. *See* pp. 217-18 *supra.*

222. U.S. CONST. art. I, § 7, cl. 1; art. I, § 9, cl. 9; *see* Turner v. American Baptist Missionary Union, 24 F. Cas. 344, 345 (C.C. Mich. 1852) (No. 14,251) (treaty provision requiring expenditure of federal funds held "not operative, in the sense of the Constitution, as money cannot be appropriated by the treaty-making power").

223. 580 F.2d 1055 (D.C. Cir.), *cert. denied,* 436 U.S. 907 (1978).

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tives sought a declaratory judgment that the treaty returning the Panama Canal to Panama was unconstitutional, on the grounds that approval by the House of Representatives as well as the Senate was required before the United States could dispose of any of its territory.[224] The Court of Appeals of the District of Columbia assumed that the treaty was self-executing, but nevertheless held that the constitutional authority for Congress to dispose of United States property[225] was permissive rather than exclusive, and that the treaty in question constituted a legitimate alternative means of disposing of such property.[226]

The constitutional status of treaties dealing with foreign commerce is similar to that of treaties disposing of government property, in that the separation of powers principle does not mandate House of Representatives participation in such action. Article I of the Constitution gives Congress the power to regulate commerce with foreign states,[227] but this power is not exclusive.[228] Consequently, the courts usually hold treaties dealing with foreign commerce to be self-executing.[229]

The foregoing discussion demonstrates that there are no simple rules to determine whether a treaty provision is self-executing. In order to assess whether Security Council resolutions on Namibia are binding, a three-fold inquiry is necessary. First we will consider previous cases containing claims that provisions of the United Nations Charter (under which the resolutions were passed) were self-executing; this investigation will show that Charter provisions and Security Council resolutions are neither self-executing nor non-self-executing as a class. Accordingly, we will next examine the wording of the

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224. *Id.* at 1056.

225. U.S. CONST., art. IV, 33, cl. 2 (property clause).

226. 580 F.2d at 1057-59.

227. U.S. CONST. art. I, § 8, cl. 3.

228. For example, the President's power to negotiate and conclude trade agreements with foreign countries has long been recognized. *See* Consumers Union of United States, Inc. v. Kissinger, 506 F.2d 136, 143-45 (D.C. Cir. 1974); *id.* at 158-62 (Leventhal, J., dissenting) (citing examples).

229. *See Security Council Resolutions and Enforceable Legal Rights, supra* note 198, at 300 n.16 (citing cases). Other treaties usually held to be self-executing are those dealing with extradition, consular rights, most-favored-nation treatment, and the right of aliens. *See Self-Executing Treaties, supra* note 204, at 778-79 (citing cases).

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resolutions themselves to analyze whether they should be held self-executing on the grounds that they disclose an intention on the part of their signatories to create binding legal obligations. Finally, we will review the record of the federal government's policies on Namibia to determine whether it can be argued that the resolutions, even assuming they are not self-executing, have nonetheless been officially executed.

1. *Are Security Council Resolutions and the Charter Self-Executing?*

Federal courts have reached differing conclusions on the question whether provisions of the United Nations Charter and resolutions passed under its authority are self-executing under American law.[230] The only case apart from *Diggs* v. *Dent*[231] to declare even in dictum that the entire Charter is non-self-executing was *Pauling* v. *McElroy:*

> The provisions of the Charter of the United Nations, the Trusteeship Agreement for the Trust Territory of the Pacific Islands, and the international law principle of freedom of the seas relied on by plaintiffs are not self-executing and do not vest any of the plaintiffs with individual legal rights which they may assert in this Court. The claimed violations of such international obligations and principles may be asserted only by diplomatic negotiations between the sovereignties concerned.[232]

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230. The Supreme Court has not ruled authoritatively on whether the Charter, or any part of it, is self-executing, and the passing references to the Charter in six Supreme Court cases are insignificant. *See Security Council Resolutions and Enforceable Legal Rights, supra* note 198, at 301 n.19 (discussing these cases). It is quite possible, of course, for part of a treaty to be held self-executing while another part is held to be non-self-executing; this is true of the Charter and Security Council resolutions as well.

231. *See* note 2 *supra.*

232. 164 F. Supp. 390, 393 (D.D.C. 1958), *aff'd per curiam on other grounds,* 278 F.2d 252 (D.C. Cir.), *cert. denied,* 364 U.S. 835 (1960).

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Pauling involved an attempt to enforce rights under Articles 73 and 76 of the Charter;[233] consequently, the statement declaring the entire Charter to be non-self-executing is dictum.

A number of Charter articles have been held non-self-executing, particularly in the field of human rights. A challenge to a California law restricting the ownership of land by aliens in *Sei Fujii v. State*[234] led to the most influential decision to date declaring the human rights provisions of the Charter non-self-executing.

In *Sei Fujii*, a Japanese alien ineligible for citizenship appealed a lower court holding that land which he had bought had escheated to the state under the California Alien Land Law. Plaintiff argued that the law violated both the equal protection clause[235] and Articles 55 and 56 of the United Nations Charter. Article 55 of the Charter commits the United Nations to "promote", *inter alia*, "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[236] Article 56 states that:

> All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.[237]

The California Court of Appeals bypassed the equal protection argument to strike down the statute on the grounds that it conflicted with the preamble and articles of the Charter.[238]

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233. *See* U.N. CHARTER art. 73 (obligations of nations assuming responsibilities for non-self-governing territories); *id.* art. 76 (objectives of international trusteeship system).

234. 217 P.2d 481 (Dist. Ct. App. Cal. 1950), *aff'd on other grounds*, 38 Cal.2d 718, 242 P.2d 617 (1952).

235. U.S. CONST. amend. XIV, § 1, cl. 2.

236. U.N. CHARTER art. 55(c).

237. *Id.* art. 56.

238. Sei Fujii v. California, 217 P.2d 481, 488 (Dist. Ct. App. Cal. 1950).

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On appeal, the California Supreme Court affirmed the lower court's decision on equal protection grounds but rejected its holding that the statute was invalid because it was inconsistent with the Charter: "The provisions in the charter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification. Instead, they are framed as a promise of future action by the member nations."[239]

While commentators have criticized *Sei Fujii*,[240] it represents the dominant approach of American courts to the problem of the domestic effect of Articles 55 and 56. Accordingly, Articles 55 and 56 have been held to be non-self-executing by subsequent courts in rejecting challenges under these articles brought against visa requirements,[241] immigration quotas,[242] and a New York literacy test determining voting eligibility.[243]

Article 73(a) of the Charter has also been held to be non-self-executing. In *United States v. Vargas*[244] the district court denied a motion to dismiss an indictment, filed by sixteen Puerto Rican draft resisters, which argued that the Selective Service Act violated the United States treaty obligations under Article 73(a) of the Charter. Article 73(a), which deals with non-self-governing territories, requires administering powers to recognize the interests of the inhabitants of these territories as "paramount" and commits them "to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses."[245] Defendants argued that Article 73(a) is self-executing and that their forcible conscription into the United States armed forces violated United States obligations under Article 73(a) to respect the political and cultural aspirations

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239. Sei Fujii v. California, 38 Cal.2d 718, 724, 242 P.2d 617, 621-22 (1952).

240. *See, e.g.*, Note, *supra* note 7, at 101-04; *Self-Executing Treaties*, *supra* note 204, at 780-86.

241. *See* Hitai v. Immigration and Naturalization Serv., 343 F.2d 466 (2d Cir. 1965).

242. *See* Vlissidis v. Anadell, 262 F.2d 398 (7th Cir. 1959).

243. *See* Camacho v. Rogers, 199 F. Supp. 155 (S.D.N.Y. 1961).

244. 370 F. Supp. 908 (D.P.R. 1974).

245. U.N. CHARTER art. 73(a).

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of the Puerto Rican people. In rejecting this claim, the court held that Article 73(a) is not "self-executory" and that it was "not a specific mandate, but rather a general standard or goal", which could not be held binding without "enabling legislation."[246]

As noted previously, the intention of the signatories that a treaty provision be self-executing is generally reflected in the fact that it does not merely endorse a principle or objective in broad terms, but is sufficiently precise and detailed so that the obligations it establishes can be enforced without implementing legislation.[247] The courts in *Sei Fujii* and *Vargas* presumably considered Articles 55 and 73(a) mere general statements of purpose, too vague and tentative to be self-executing treaty obligations. The decisions reflect both the courts' belief that the signatories to the Charter did not intend Articles 55, 56, and 73(a) to create immediately enforceable individual legal rights, and a desire to safeguard and preserve the full range of legislative power and authority which would necessarily be restricted by an overriding treaty obligation.

Results in other cases, however, contradict the dictum in *Pauling v. McElroy* [248] that the entire Charter is non-self-executing. The Court of Appeals of the District of Columbia, the same court that affirmed *Pauling*, held in *Keeney v. United States*[249] that Articles 100 and 105 of the Charter, which guarantee to the United Nations and its officials the privileges and immunities necessary to ensure their independence, were self-executing. Courts in *Balfour, Guthrie & Co. v. United States*[250] and in *Curran v. City of New York*[251] have held that Article 104 of the Charter, which confers legal capacity on the United Nations, was self-executing.

Concededly, Articles 100, 104, and 105 deal only with the internal operations of the United Nations in New York City. They have only limited relevance to the substantive international law issues involved in the conduct of foreign affairs. Two other recent cases, however, support the proposition that broad international law principles embodied in Charter provisions are self-

246. 370 F. Supp. at 915.

247. *See* pp. 218-20 *supra*.

248. 164 F. Supp. 390, 393 (D.D.C. 1958), *aff'd per curiam on other grounds*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960).

249. 218 F.2d 843 (D.C. Cir. 1954).

250. 90 F. Supp. 831 (N.D. Cal. 1950).

251. 191 Misc. 299, 77 N.Y.S.2d 206 (Sup. Ct. 1947).

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executing. In *United States v. Toscanino*,[252] the appellant, an Italian citizen, appealed his conviction on a narcotics charge. He alleged that agents of the Federal Bureau of Narcotics and Dangerous Drugs helped to abduct him forcibly and illegally from Uruguay in violation of Article 2(4) of the Charter. Article 2(4) prohibits infringement of the territorial sovereignty of a nation. The Second Circuit impliedly held Article 2(4) to be self-executing by remanding the case to the district court for an evidentiary hearing to determine whether appellant could adduce evidence to support his charges.[253]

A Ninth Circuit decision, *Saipan v. Dep't. of Interior*,[254] is significant because of its parallels with the Namibian case. The court in *Saipan* held that the Trusteeship Agreement[255] between the United States and the United Nations for the administration of the Trust Territory of the Pacific Islands (Micronesia), entered into under Article 73 of the Charter, is self-executing. Citizens of the island of Saipan sued to enjoin the implementation of a lease agreement between the High Commissioner for the Trust Territory and Continental Airlines to construct a hotel on public land on Saipan, unless an environmental impact study was made under the National Environmental Policy Act.[256] Concluding that principles of comity dictated that plaintiffs initially pursue their remedy in the High Court of the Trust Territory, the Ninth Circuit dismissed their suit on jurisdictional grounds.[257] The court emphasized, however, that this dismissal was without prejudice

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252. 500 F.2d 267 (2d Cir. 1974).

253. *Id.* at 281. *But see* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975) (limiting *Toscanino* to situations in which the defendant was tortured, as opposed to merely being kidnapped or illegally abducted from a foreign country to face charges in the United States).

254. 502 F.2d 90 (9th Cir. 1974).

255. Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665. The Trusteeship Agreement is both a treaty between the United States and the United Nations, and a statute passed by Congress.

256. 42 U.S.C. § 4321 (1970).

257. 502 F.2d at 100.

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and added that "[i]f our assumption that the High Court has the power to review the decision of the High Commissioner proves to be invalid, then the federal district court must assume jurisdiction of this case."[258]

The court of appeals ruled in addition, however, that the Trusteeship Agreement was a self-executing treaty which "can be a source of rights enforceable by an individual litigant in a domestic court of law."[259] It rejected defendant's argument that the provisions of the Trusteeship Agreement could be enforced only before the Security Council:

> The preponderance of features in this Trusteeship Agreement suggests the intention to establish direct, affirmative, and judicially enforceable rights. . . . [T]he concern with natural resources and the concern with political development are explicit in the agreement and are general international concerns as well; the enforcement of these rights requires little legal or administrative innovation in the domestic fora; and the alternative forum, the Security Council, would present to the plaintiffs obstacles so great as to make their rights virtually unenforceable.[260]

In reaching this decision, the court refrained from deciding plaintiffs' contention that Articles 73 and 76 were independently self-executing.[261] As noted previously, however, the Trusteeship Agreement was entered into under Article 73 of the Charter.[262] Although the holding that the Trusteeship Agreement is self-executing does not require the conclusion that Article 73 is self-executing, *Saipan* presents an interesting parallel with the Namibian fur seal skins litigation, because the resolutions on Namibia were also passed under the authority of the Charter.[263]

The preceding survey demonstrates that Charter provisions have been accorded varying treatment

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258. *Id.*
259. *Id.* at 97.
260. *Id.* at 97-98.
261. *Id.* at 97.
262. *See* p. 66 *supra.*
263. *See* note 282 *infra.*

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in American courts. Some, especially those in the field of human rights, have been held to be non-self-executing, but others have been held to be self-executing. The question of whether Security Council resolutions on Namibia are self-executing was not litigated before *Diggs v. Dent.*[264] The question can only be addressed through a detailed analysis of the two resolutions on Namibia.

2. *Are Security Council Resolutions 276 and 301 Self-Executing?*

The strongest foundation for any claim that the United Nations position on the Namibian question imposes binding legal obligations on the United States is to be found in the relevant resolutions of the Security Council, whose "decisions" the members agree to "accept and carry out" under Article 25.[265] The most important of these are Resolutions 276[266] and

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264. *See* note 2 *supra.*

265. U.N. CHARTER art. 25.

266. S.C. Res. 276, 25 U.N. SCOR 1-2, U.N. DOC. S/INS./25 (1970): The Security Council,

Reaffirming the inalienable right of the people of Namibia to freedom and independence recognized in General Assembly resolution 1514(XV) of 14 December 1960,

Reaffirming General Assembly resolution 2145(XXI) of 27 October 1966, by which the United Nations decided that the Mandate for South West Africa was terminated and assumed direct responsibility for the Territory until its independence,

Reaffirming Security Council resolution 264 (1969) of March 1969 in which the Council recognized the termination of the Mandate and called upon the Government of South Africa to withdraw immediately its administration from the Territory,

Reaffirming that the extension and enforcement of South African laws in the Territory together with the continued detentions, trials and subsequent sentencing of Namibians by the Government of South Africa constitute illegal acts and flagrant violations of the rights of the Namibians concerned, the Universal Declaration of Human Rights and the international status of the Territory, now under direct United Nations responsibility,

Recalling Security Council resolution 269 (1969) of 12 August 1969,

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301,[267] for which the United States voted and for which

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266. (Continued)

1. *Strongly condemns* the refusal of the Government of South Africa to comply with the resolutions of the General Assembly and Security Council pertaining to Namibia;

2. *Declares* that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid;

3. *Declares further* that the defiant attitude of the Government of South Africa towards the Council's decisions undermines the authority of the United Nations;

4. *Considers* that the continued occupation of Namibia by the Government of South Africa in defiance of the relevant United Nations resolutions and of the Charter of the United Nations has grave consequences for the rights and interests of the people of Namibia;

5. *Calls upon* all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2 of the present resolution;

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, an *Ad Hoc* Sub-Committee of the Council to study, in consultation with the Secretary-General, ways and means by which the relevant resolutions of the Council, including the present resolution, can be effectively implemented in accordance with the appropriate provisions of the Charter, in the light of the flagrant refusal of South Africa to withdraw from Namibia, and to submit its recommendations by 30 April 1970;

7. *Requests* all states, as well as the specialized agencies and other relevant organs of the United Nations, to give the Sub-Committee all the information and other assistance it may require in pursuance of the present resolution;

8. *Further requests* the Secretary-General to give every assistance to the Sub-Committee in the performance of its task;

9. *Decides* to resume consideration of the question of Namibia as soon as the recommendations of the Sub-Committee have been made available.

267. S.C. Res. 301, 26 U.N. SCOR 8, U.N. DOC. S/INS./27 (1971): The Security Council,

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the executive branch has continued to voice support. As will later be demonstrated, it is doubtful that public

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267. (Continued)

Reaffirming the inalienable right of the people of Namibia to freedom and independence as recognized in General Assembly resolution 1514(XV) of 14 December 1960,

Recognizing that the United Nations has direct responsibility for Namibia following the adoption of General Assembly resolution 2145(XXI), and that States should conduct any relations with or involving Namibia in a manner consistent with that responsibility,

Reaffirming its resolutions 264 (1969) of 20 March 1969, 276 (1970) of 30 January 1970 and 283 (1970) of 29 July 1970,

Recalling its resolution 284 (1970) of 29 July 1970 requesting the International Court of Justice for an advisory opinion on the question:

"What are the legal consequences for States of the continuing presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?",

Gravely concerned at the refusal of the Government of South Africa to comply with the resolutions of the Security Council pertaining to Namibia,

Recalling its resolution 282 (1970) of 23 July 1970 on the arms embargo against the Government of South Africa and stressing the significance of that resolution with regard to the Territory of Namibia,

Recognizing the legitimacy of the movement of the people of Namibia against the illegal occupation of their Territory by the South African authorities and their right to self-determination and independence,

Taking note of the statements by the delegation of the Organization of African Unity led by the President of Mauritania, in his capacity as current Chairman of the OAU Assembly of Heads of State and Government,

Noting further the statement by the President of the United Nations Council for Namibia,

Having Heard the statements by the delegation of the Government of South Africa,

Having considered the report of the *Ad Hoc* Sub-Committee on Namibia (S/10330),

1. *Reaffirms* that the Territory of Namibia is the direct responsibility of the United Nations and

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expressions of support for the resolutions by the Secretary of State and other government spokesmen constitute an "execution" of the resolution,

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267. (Continued)
that this responsibility includes the obligation to support and promote the rights of the people of Namibia in accordance with General Assembly resolution 1514(XV);

2. *Reaffirms* the national unity and territorial integrity of Namibia;

3. *Condemns* all moves by the Government of South Africa designed to destroy that unity and territorial integrity, such as the establishment of Bantustans;

4. *Declares* that South Africa's continued illegal presence in Namibia constitutes an internationally wrongful act and a breach of international obligations and that South Africa remains accountable to the international community for any violations of its international obligations or the rights of the people of the Territory of Namibia;

5. *Takes note* with appreciation of the advisory opinion of the International Court of Justice of 21 June 1971;

6. *Endorses* the Court's opinion expressed in paragraph 133 of the advisory opinion:

"(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;

"(2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;

"(3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia."

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which would impose treaty obligations

267. (Continued)

7. *Declares* that all matters affecting the rights of the people of Namibia are of immediate concern to all Members of the United Nations and as a result the latter should take this into account in their dealings with the Government of South Africa, in particular in any dealings implying recognition of the legality of or lending support or assistance to such illegal presence and administration;

8. *Calls once again* on South Africa to withdraw from the Territory of Namibia;

9. *Declares* that any further refusal of the South African Government to withdraw from Namibia could create conditions detrimental to the maintenance of peace and security in the region;

10. *Reaffirms* the provisions of resolution 283 (1970), in particular paragraphs 1 to 8 and 11;

11. *Calls upon* all States in discharge of their responsibilities towards the people of Namibia and subject to the exceptions set forth in paragraphs 122 and 125 of the advisory opinion of 21 June 1971;

(a) To abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia;

(b) To abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation;

(c) To review their bilateral treaties with South Africa in order to ensure that they are not inconsistent with paragraphs 5 and 6 above;

(d) To abstain from sending diplomatic or special missions to South Africa that include the Territory of Namibia in their jurisdiction;

(e) To abstain from sending consular agents to Namibia and to withdraw any such agents already there;

(f) To abstain from entering into economic and other forms of relationships or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory;

12. *Declares* that franchises, rights, titles or contracts relating to Namibia granted to individuals or companies by South Africa after the adoption of

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enforceable in American courts.[268] The most promising approach in litigation seeking to enforce Resolutions 276 and 301 is to argue, as did plaintiffs in *Diggs v. Dent*,[269] that these resolutions are self-executing.

The district court in *Dent* rejected this claim, asserting that "the provisions of the Charter of the United Nations are not self-executing and do not vest any of the plaintiffs with any individual legal rights which they may assert in this court".[270] This conclusion put the district court squarely in conflict with the holding in *Keeney* v. *United States*[271] that

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267 (Continued)
General Assembly resolution 2145(XXI) are not subject to protection or espousal by their States against claims of a future lawful Government of Namibia;

13. *Requests* the *Ad Hoc* Sub-Committee on Namibia to continue to carry out the tasks entrusted to it by paragraphs 14 and 15 of resolution 283 (1970) and, in particular, taking into account the need to provide for the effective protection of Namibian interests at the international level, to study appropriate measures for the fulfilment of the responsibility of the United Nations towards Namibia;

14. *Requests* the *Ad Hoc* Sub-Committee on Namibia to review all treaties and agreements which are contrary to the provisions of the present resolution in order to ascertain whether States have entered into agreements which recognize South Africa's authority over Namibia, and to report periodically thereon;

15. *Calls upon* all States to support and promote the rights of the people of Namibia and to this end to implement fully the provisions of the present resolution;

16. *Requests* the Secretary-General to report periodically on the implementation of the provisions of the present resolution.

268. *See* pp. 255-57 *infra*.
269. *See* note 2 *supra*.
270. *Id.*, 14 INT'L LEGAL MATERIALS at 797.
271. 218 F.2d 843 (D.C. Cir. 1954).

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at least two provisions of the Charter, Articles 100 and 105, were self-executing. The court of appeals in *Diggs v. Richardson*[272] impliedly disapproved the broad district court holding when it affirmed the decision concerning Resolution 301 on the narrowest grounds: it held only that subsection (d) dealing with the sending of diplomatic or special missions to Namibia and subsection (f) discouraging economic dealings with South Africa concerning Namibia were not self-executing.[273]

Resolution 301 "requests" and "calls upon" member states to "abstain from sending diplomatic or special missions to South Africa that include the Territory of Namibia in their jurisdiction."[274] As noted previously, negative treaty stipulations are more readily held self-executing than other types of treaty provisions.[275] While the verbs employed in Resolution 301 appear to be hortatory, those voting for Resolution 301 undoubtedly intended to prohibit such missions.[276]

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272. 555 F.2d 848, 849 (D.C. Cir. 1976).

273. Judge Leventhal's opinion is confusing on this point. First, he states that the holding of the case is "that the U.N. Security Council Resolution involved here is not self-executing." *Id.* at 850 n.9. In the same context of the self-executing treaty doctrine, however, he declares that "we made [make?] no decision with respect [to?] those provisions of U.N. Security Council Resolution 301 which are not involved here." *Id.* at 851 n.10. The most reasonable conclusion in seeking to reconcile these seemingly inconsistent statements is that the court meant the second statement literally, while in the first passing reference to the non-self-executing Security Council resolution, the Court intended it to be understood that it was referring only to the parts of Resolution 301 involved in the case (Subsections (d) and (f)).

274. S.C. Res. 301, 26 U.N. SCOR 8, U.N. DOC. S/INS./27 (1971).

275. *See* p. 218 *supra*.

276. A textual analysis of relevant provisions of Resolution 301 in Note, *supra* note 182, at 412-17, concludes that it is possible to argue on the basis of the resolution's wording that its drafters intended it to be self-executing, although the author later concludes from a consideration of "Material Outside of the Agreement" that the resolution is not self-executing. *Id.* at 417-19.

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Plaintiffs in *Dent* contended that Resolution 301 imposed direct and explicit international obligations, requiring no legislative implementation to bind the executive branch. They emphasized that (1) Resolution 301 embodied a call to take immediate action rather than a contract or agreement to do so in the future, (2) the executive branch had full authority over the conduct of foreign affairs involved in the case, so that no congressional participation was necessary to give binding domestic effect to the resolution's provisions, and (3) unlike the treaty provisions in *Diggs v. Shultz*,[277] which required compliance both by private persons and by governments to enforce the trade embargo, Resolution 301 was addressed solely to action by governments.[278] Plaintiffs argued that although legislative action might be deemed necessary or appropriate in such matters before a government could impose binding obligations upon individual citizens, it was logical to hold the executive branch itself directly accountable for the international obligations to which it had already acceded when it voted for Resolution 301.

The view that United States action should conform to Security Council resolutions is persuasive in light of the fact that no resolution can be passed without United States support, or at least acquiescence.[279] The underlying rationale for the self-executing treaty doctrine is the principle that the United States should not be bound by international treaty obligations to which the appropriate branches of government have not agreed. The situations

277. 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

278. Judge Leventhal in Diggs v. Richardson agreed that the provisions of Resolution 301 were addressed to governments, calling upon them "to take certain action"; he concluded from this, however, that these provisions "were not addressed to the judicial branch of our government." 555 F.2d 848, 851 (D.C. Cir. 1976). In effect, he found the provisions were non-self-executing.

279. The United States and the four other permanent members of the Security Council have the power to veto any Security Council resolution. *See* U.N. CHARTER art. 27.

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in which it can be argued that enforceable rights and obligations arise can be analytically divided into five procedural alternatives:

> (1) upon passage of the resolution by the Security Council, (2) upon passage of the resolution by the Security Council only if the United States casts an affirmative vote, (3) upon passage of the resolution by the Security Council plus confirmation of its provisions through a presidential order as provided in the United Nations Participation Act, (4) upon passage of the resolution by the Security Council plus its formal ratification as a treaty by the President upon the advice and consent of the Senate, (5) upon passage of the resolution by the Security Council plus some type of legislative implementation by Congress.[280]

Because of the positive endorsement by the appropriate branch of the United States government, there is no question that alternatives (4) and (5) create binding treaty obligations. *Shultz* demonstrates that a presidential executive order under the third alternative can give definite and binding force to a resolution. Similarly, it can be argued that under the second alternative, by instructing a representative to vote for a Security Council resolution, the President is in effect entering into a binding executive agreement pursuant to Article 25 of the Charter. Only in the case of alternative (1) can no colorable argument be made that passage of a Security Council resolution creates United States treaty obligations, because this alternative does not necessarily entail approval of the resolution by any branch of the United States government.[281]

The executive branch in recent years has adopted the view that United Nations "decisions" are legally binding upon members under Article 25 only in situations where world peace is threatened. According to this view, Resolutions 276 and 301 could not impose binding legal obligations because they were

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280. *Security Council Resolutions and Enforceable Legal Rights*, *supra* note 198, at 310 (footnote omitted).

281. *Id.* at 312.

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ratified under Chapter VI of the Charter rather than Chapter VII.[282] The International Court of Justice, however, has taken the position that the binding effect of Article 25 pertains to Security Council resolutions passed under Chapter VI as well as Chapter VII of the Charter.[283]

Since the International Court of Justice position reflects the dominant view, the United States should not vote in favor of a Security Council resolution and then adopt a minority construction of the resolution. Members of the United Nations should respect International Court of Justice opinions,[284] and it would thus be more reasonable for the United States to adhere to the Court's view of the meaning and effect of Security Council resolutions and then to proceed to vote either for or against them on that basis.

The consequence of this analysis in the context of the Namibian case is that by voting for Resolution 301, the United States subjected itself to the obligations of a self-executing treaty.[285] As we

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282. *Cf.* Higgins, *supra* note 7, at 277-83 (generally describing view). According to the executive branch's view of Article 25, only a Security Council resolution invoking Articles 39 and 41 of the Charter (regarding threats to world peace) can impose binding legal obligations upon member states. *See Security Council Resolutions and Enforceable Legal Rights, supra* note 198, at 309 n.62; Note, *supra* note 182, at 418-19. Resolutions 276 and 301 were passed pursuant to Article 24 of the Charter.

283. Namibia Advisory Opinion, *supra* note 181. This position is supported by Higgins, *supra* note 7, and Note, *supra* note 7, at 89-91.

284. Article 92 of the United Nations Charter states that "[t]he International Court of Justice shall be the principal judicial organ of the United Nations." Article 93(1) states that "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."

285. That such a conclusion is reasonable, albeit not compelled, is recognized in Note, *supra* note 182, at 416. The writer concludes, however, that Resolution 301 does not impose binding legal obligations on the United States because he interprets United States intent as favoring the narrowest possible scope for Security Council resolutions deemed binding on member states. *Id.* at 419. It is submitted that this is a one-sided application of the "intent" test, and that the *effect* of a United States vote for a Security Council resolution should be what a majority of United Nations members consider it to be.

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have noted, it is difficult to reduce to definitive rules the criteria by which courts have determined whether specific United States treaty obligations were self-executing.[286] Probably the most difficult proposition for plaintiffs to establish im the Namibian case was that Article 25 of the Charter and Resolution 301 together could bind the United States without further legislative implementation. Once this is accepted, however, it should not be difficult for the prohibitions of Resolution 301 to satisfy the tests of self-execution. The prohibitions are categorical and specific, and they are easier to apply than various positive injunctions.[287] If American courts' appreciation of the character of our international treaty obligations increases, future courts may well hold treaty provisions similar to those in Resolution 301 to be self-executing.

3. *If Resolutions 276 and 301 are Held to be Non-Self-Executing, Have They Been Executed by the United States Government?*

Even if it is determined that a claimed treaty obligation of the United States is non-self-executing, the obligation may still be held binding if a court concludes that it has been "executed". The principle that a treaty can be executed is an outgrowth of the separation of powers principle. Without execution, some treaty obligations would remain nugatory, but when Congress acts to implement them, it removes any danger that their enforcement would infringe upon its constitutional authority.

The United Nations Participation Act of

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286. *See* pp. 216-17 *supra*.

287. For example, see the positive treaty term which was held self-executing in Asakura v. Seattle, 265 U.S. 332, 340-43 (1924) (holding that a municipal ordinance excluding aliens from pawnbroker business violated treaty with Japan which gave Japanese subjects "'liberty to enter, travel and reside'" in the United States "'to carry on trade, wholesale and retail'").

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1945[288] furnishes an important example of congressional action to execute a treaty. The Act authorizes the President to impose economic and communications sanctions when the Security Council, under Article 41 of the Charter, so requests, and to subject violators of the sanctions to criminal penalties.[289] President Johnson exercised his authority under the United Nations Participation Act when he issued executive orders, pursuant to Security Council resolutions, imposing sanctions on the white minority regime in Rhodesia.[290]

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288. 22 U.S.C. § 287(c) (1976). The Act provides in pertinent part:

> §287c. *Enforcement of economic and communication sanctions; penalties*
>
> (a) Notwithstanding the provisions of any other law, whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States.

Much of this language merely repeats the terms of Article 41 of the United Nations Charter.

289. Subsection (b) of 22 U.S.C. § 287(c) (1976), establishes penalties of up to a $10,000 fine or ten years in prison for violation of this section.

290. Security Council Resolution 232 of 1966, for which the United States voted, imposed an embargo on importation of specified goods from Rhodesia, including chrome. S.C. Res. 232, 21 U.N. SCOR 7, U.N. DOC. S/INS./21 (1966). President Johnson by executive order thereupon banned the importation of the specified goods into the United States. *See* EXEC. ORDER NO. 11,322, 3 C.F.R. 606 (1966-70).

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The circumstances of the Namibian case were different, however. Security Council Resolutions 276[291] and 301[292] were passed under the authority of Article 24 of the Charter. There is no federal statute comparable to the United Nations Participation Act providing for United States implementation of Article 24 resolutions.[293] This does not dispose of the question of execution, however,

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290 (Continued)

In 1968, the Security Council, again with United States support, passed Resolution 253, which extended the embargo to all Rhodesian products, 23 U.N. SCOR 15, U.N. DOC. S/INS./23 (1968). President Johnson then issued a second executive order banning all Rhodesian imports into the United States. EXEC. ORDER NO. 11,419, 3 C.F.R. 737 (1966-70). Passage of the Byrd Amendment by Congress in 1971 effectively nullified these measures. P.L. No. 92-156, 85 Stat. 427 (1971), amending the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. §§ 98-98h (1970 & Supp. V 1975).

Resolutions 232 and 253 could thus be regarded either as *self-executing* under the United Nations Participation Act or as *executed* by executive orders. Consequently, the Court of Appeals of the District of Columbia in Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973), had no occasion to analyze self-executing treaty questions in reaching its conclusion that the United States was required by international treaty obligations to observe the Rhodesian embargo.

291. S.C. Res. 276, 25 U.N. SCOR 1-2, U.N. DOC. S/INS./25 (1970), *see* note 266 *supra*.

292. S.C. Res. 301, 26 U.N. SCOR 8, U.N. DOC. S/INS./27 (1971); *see* note 267 *supra*.

293. In the appeal of *Dent*, the Justice Department claimed that "it is manifest, we submit, that absent express action by the Political Branches of the Government Security Council Resolutions do not become part of the law of the land." Brief for the Defendant-Appellee at 21, Diggs v. Morton (*sub nom.* Diggs v. Richardson), 555 F.2d 848 (D.C. Cir. 1976), in *Dent* File, *supra* note 14. This proposition is hardly "manifest", given the fact that the courts have held both United Nations Charter provisions and agreements signed pursuant to them to be self-executing. *See* pp. 227-29 *supra*.

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because courts have held that treaty obligations can be executed in ways other than by federal statute.[294]

Viewed as a consequence of the separation of powers doctrine, the principal function of the requirement that a treaty be executed is to ensure that Congress is consulted on important matters which overlap with its legislative function.[295] Another reason for requiring treaties to be executed, however, is that their terms may be too vague or general to indicate how they are to be carried out. In such cases, the necessary clarification may sometimes be provided by execution.

The first case, *United States v. Robins*,[296] in which the executive executed a treaty arose under the Jay Treaty of 1794 with Great Britain. Article XXVII of the treaty provided for the extradition of British subjects charged with murder and forgery but did not specify which American officials were responsible for taking this action. A British seaman, who was suspected of participating in a mutiny aboard a British ship which resulted in the death of an officer, was arrested and imprisoned in a South Carolina prison on a murder charge. The Secretary of State informed the district court that the British consul had asked for the extradition

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294. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 272-73 (1796) (Iredell, J., concurring), contains dicta to the effect that the executive and the judiciary could also execute the provisions of a treaty. Since Justice Iredell had heard the case below, he recused himself at the Supreme Court level but nevertheless read his Circuit Court opinion when the Supreme Court handed down its decision. His statement implying that the executive branch can execute a treaty is thus doubly a dictum.

295. The president has the principal responsibility in the constitutional scheme for conducting foreign affairs; the executive branch is responsible for originating, negotiating, and concluding treaties. The Constitution also gives the Senate, however, the power and duty to advise on and consent to treaties. The Framers presumably deemed such a power necessary since treaties are equal in force to statutes, and Congress' exclusive power to legislate might be compromised if the executive could conclude treaties without it.

296. 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175).

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of the seaman under Article XXVII and that President Adams had authorized him to communicate "his advice and request" that the seaman be delivered to the consul or other appropriate agent of Great Britain.[297] After a habeas corpus proceeding, District Judge Bee ordered the seaman surrendered to the British consul.

Judge Bee purported to exercise an inherent power of the federal judiciary to execute the treaty, but this seemed unwarranted in the absence of any jurisdictional grant by statute or treaty. As a result, the case has come to be viewed as one in which President Adams rather than the district court executed the treaty, and

> it has been looked upon as authority for the proposition that the President, in virtue of his constitutional grant of executive power, is competent to execute a treaty, when . . . the treaty fails to confer such competence on any particular officer, and Congress has not filled this void by an appropriate grant of authority.[298]

The conclusion that the President can execute a non-self-executing treaty is reinforced by Supreme Court holdings that even without Senate ratification, binding treaty obligations can be incurred when the President concludes an executive agreement.[299] Consequently, even if a court holds that Resolutions 276 and 301 are not self-executing, the possibility that they have been executed by executive action must be investigated.

The court of appeals in *Diggs v. Richardson*[300] held in effect that Resolution 301 had not been executed when it concluded that there was no "domestic legislation evincing any intention for judicial enforcement"[301]

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297. *Id.* at 826-27.

298. United States *ex rel.* Martinez-Angosto v. Mason, 344 F.2d 673, 683-84 (2d Cir. 1965). Article II, § 3 of the Constitution, which imposes upon the President the duty to "take Care that the Laws be faithfully executed," has been cited in support of this inferred presidential power. *See* United States *ex rel.* Martinez-Angosto v. Mason, *supra*, at 683.

299. *See, e.g.*, United States v. Pink, 315 U.S. 203, 223 (1942); United States v. Belmont, 301 U.S. 324, 330-31 (1937); *Security Council Resolutions and Enforceable Legal Rights, supra* note 198, at 308 n.55.

300. 555 F.2d 848 (D.C. Cir. 1976).

301. *Id.* at 851 (footnote omitted).

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of its provisions. The court apparently did not even consider the possibility that the resolution might have been executed by the *executive*, nor is it likely that the parties briefed this issue.

To determine the accuracy of the court of appeals' conclusion that Resolution 301 had not been executed, it is necessary to review the policy of both the executive and legislative branches towards Namibia in the years after adoption of Resolution 301 in 1971. Since 1971 Congress has rarely considered the Namibian question,[302] and it has taken no action that could be considered an execution of Resolution 301. As the following history will show, the executive stance on Namibia has been too equivocal to constitute the decisive action required for execution of a treaty provision. Consequently, it would be difficult to challenge the implicit conclusion of the court of appeals that the federal government has not taken any direct specific action which would constitute an execution of Resolution 301.

a. *Recent United States Policy on Namibia*

The 1971 Namibia Advisory Opinion held that the South African mandate over Namibia had terminated, that South Africa's continued presence in Namibia was illegal, and that United Nations members were obligated to refrain from any acts or dealings implying recognition of the legality of South African administration of Namibia.[303] On October 4, 1971, Secretary of State Rogers declared that the United States accepted the Court's opinion.[304] The United States voted for

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302. The only congressional body to take up the Namibian question appears to have been Congressman Diggs' Subcommittee on Africa. *See, e.g., Critical Developments in Namibia: Hearings Before the Subcommittee on Africa of the House Committee on Foreign Affairs*, 93d Cong., 2d Sess. (Feb. 2, and Apr. 4, 1974) [hereinafter cited as *Critical Developments in Namibia*]. The recent five-power (United States, Britain, France, West Germany, and Canada) initiative seeking a compromise solution to the Namibian dispute has not become an issue in Congress.

303. *See* note 181 *supra* (citing case).

304. *See* 65 DEP'T STATE BULL. 437, 439 (1971) (address to United Nations General Assembly).

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Resolution 301 endorsing the International Court of Justice opinion two weeks later.[305]

While continuing formal opposition to South African policies on Namibia, the Nixon and Ford administrations took little action to promote United Nations objectives. The State Department's first application of Resolution 301 grew out of the Commerce Department's consideration of the Fouke Company's waiver application. At the behest of Congressman Diggs and others, Deputy Secretary of State Ingersoll informed Secretary of Commerce Dent that the State Department did not believe that the proposed third visit by Commerce Department personnel to Namibia "[could] be brought into conformity with the . . . obligations" of Resolution 301.[306] As the litigation in the seal skins case indicates, no action was taken by the President to resolve the intra-executive conflict over the importation waiver.

In September 1974 the Council for Namibia issued a decree for the protection of the territory's natural resources.[307] The decree declared South African concessions for the exploitation of Namibian natural resources null and void, stated that the Council's approval was required for any further concessions, and proclaimed that ships exporting Namibian natural resources and the cargoes of such ships were liable to seizure by or on behalf of the Council.[308] The United States abstained from the General Assembly resolution calling for compliance with the decree.[309] Thus the record of the Nixon

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305. *See* 65 DEP'T STATE BULL. 609-10 (1971) (statement by Ambassador Bennett to the Security Council).

306. DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1974, at 599-600 (A. Rovine ed. 1975) (letter of August 2, 1974) [hereinafter cited as A. Rovine].

307. *See* 29 U.N. GAOR, Supp. (No. 24A) 27-8, U.N. DOC. A/9624/ADD. 1 (1975).

308. *See id.*

309. 29 U.N. GAOR, Supp. (No. 31) 106, U.N. DOC. A/9631 (1974). The principal reason why the United States abstained on Resolution 3295 was that it also implicitly requested action by the Security Council under Chapter VII. *See* 73 DEP'T STATE BULL 44 (1975).

The United States has taken a rather ambivalent attitude towards the Council for Namibia. Although it has made modest financial contributions to the Council's activities, it abstained on United Nations General Assembly Resolution 2248,

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and Ford Administrations on Namibia does not disclose any intention to execute Resolution 301.[310] On the contrary, the State Department's opposition to the

309 (Continued)
establishing the Council. It has declined to become a member of the Council and has interpreted Resolution 2248, directing the Council to proceed to Namibia and granting it broad administrative powers "to be discharged in the Territory," to mean that the Council can exercise its powers only when it is admitted to Namibia. G.A. Res, 2248 (s-v), 5th Sp. Sess. U.N. GAOR, Supp. (No. 1) 1, U.N. DOC. A/6657 (1967); *see* 73 DEP'T STATE BULL. 36 (1975) (statement of Assistant Secretary of State for African Affairs Davis before a Subcommittee of the House Committee on International Relations). The State Department, however, has also taken the position "that enforcement jurisdiction regarding [the decree for the protection of Namibian natural resources] rests not with the Executive Branch but rather with the courts and the parties involved." 73 DEP'T STATE BULL. 37-38 (1975).

The rather conservative posture of United States policy on South Africa during this period is illustrated by the fact that the United States joined Britain and France in vetoing Security Council resolutions calling for the expulsion of South Africa from the United Nations and a mandatory arms embargo against South Africa. *See* McDowell, *Contemporary Practice of the United States Relating to International Law,* 69 AM. J. INT'L L. 861, 880-82 (1975).

310. An explanation for the contrast between the Nixon and Ford Administrations' formal support for the United Nations position on Namibia and other Southern African issues, on the one hand, and their consistent opposition to collective action by governments in the United Nations and elsewhere to censure or penalize South Africa, on the other, is perhaps to be found in *National Security Study Memorandum 39*. The *Memorandum* was a secret 1969 State Department study of Southern Africa and United States policy options commissioned by Henry Kissinger. For its text, which was leaked to the press in 1969, see THE KISSINGER STUDY OF SOUTHERN AFRICA (M. El-Khawas & B. Cohen eds. 1976) [hereinafter cited as THE KISSINGER STUDY]. This study, an exercise in Realpolitik, is remarkable both for its candor and pragmatism and for the inaccuracy of its predictions. It shows that the official American view of Southern Africa was based on the conviction that the white-dominated regimes in the area were there to stay and could not be dislodged by the black majority. It thus counselled American support for these regimes, which was to be provided without a forthright repudiation of the Kennedy-Johnson arms embargo against South Africa or of support for majority rule. *Cf.* note 311 *infra.*

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imposition of Chapter VII sanctions[311] might be interpreted as evidence that the government did not wish to implement or execute Resolution 301.

The Carter Administration has considerably changed United States policy toward Africa. One objective of this transformation is to seek rapprochement with such mainstream African countries as Nigeria. Among the policy changes implemented thus far have been United States support for a mandatory arms embargo against South Africa[312] and repeal of the Byrd Amendment

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311. *See* pp. 211-12 *supra*. In explaining the United States veto (together with France and Great Britain) of the Security Council resolution imposing a mandatory arms embargo on South Africa, Ambassador Scali stated that although the United States had voluntarily banned all arms shipments to South Africa for the past 12 years, it did not believe that the Namibian situation constituted the actual threat to world peace required for the invocation of sanctions under Chapter VII of the United Nations Charter. *See* McDowell, *supra* note 309, at 880-81; 73 DEP'T STATE BULL. 272 (1975) (statement by Assistant Secretary of State Buffum before the Subcommittee on Africa of the Senate Committee on Foreign Relations). The same reason was later given in explanation of the United States abstention or "no" vote on other Namibian resolutions passed almost unanimously by the General Assembly. *See* E. McDowell, *supra* note 3 at 637, 722.

The United States again vetoed a draft Security Council resolution imposing a mandatory arms embargo against South Africa under Chapter VII of the Charter on October 19, 1976. Ambassador William Scranton opposed the embargo on the grounds that it might prejudice the delicate negotiations then under way to bring about a peaceful independent settlement for Namibia. *Id.* at 721-22. In addition, the United States joined Britain and France in vetoing a Security Council resolution calling for the expulsion of South Afri from the United Nations on October 30, 1974). *See* 73 DEP'T STATE BULL. 271, 272 (1975). The United States however, continued to giv *formal* support for Namibian independence when it voted for Security Council Resolution 366 of December 17, 1974, and Resolution 385 of January 30, 1976. *See id.* at 272-73.

312. President Carter decided on this historic change after the South African government hardened its stance and adopted various repressive measures against domestic opponents on October 19, 1977. On October 31, 1977, Ambassador Young announced to the Security Council that the United States would support a mandatory arms embargo against South Africa under Chapter VII of the Charter. This resolution was adopted unanimously on November 4. On the same day, the House of Representatives voted 347 to 57 to condemn the actions of the South African government. *See* Press Releases, United

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which had permitted the importation of Rhodesian chrome.[313] Although such policies have drawn the wrath of some American conservatives, there are signs that they have created a much more positive political climate for the United States among African countries.[314]

b. *The United Nations Five-Power Plan for Namibia*

With respect to Namibia, the State Department, with the collaboration of Britain, Canada, France, and West Germany (the "contact group"), has spearheaded an effort to negotiate a compromise independence

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States Mission to the United Nations, October 19, 1977, October 31, 1977, November 4, 1977 (on file with *Yale Studies in World Public Order*). In February 1978, the Commerce Department extended the United States ban on arms exports to South Africa to products or technology that might be used by South Africa's police or armed forces. In recent months, business groups have been lobbying to have the ban relaxed. Hovey, *Ban on Arms to Pretoria Worrying U.S. Business*, N.Y. Times, Dec. 21, 1978, at A18, col. 1.

313. See amendments to the United Nations Participation Act, 22 U.S.C. § 287c (1976). While the Nixon and Ford Administrations formally opposed the Byrd Amendment, they did not actively work for its repeal. In 1975 the House of Representatives voted down a bill to repeal the Amendment by a vote of 209 to 187. President Carter, however, strongly endorsed repeal when he took office and sent Ambassador Young to lobby for it in the House of Representatives. The House passed a repeal bill on March 14, 1977, by a vote of 250-146. The next day, the Senate passed another repeal bill 66-23 and then voted to substitute the House bill, thus enabling the bill to go directly to the President without passing through a conference committee. On March 17, President Carter announced the repeal in his speech to the United Nations, and he signed it into law the next day. *See Recent Developments - Import Restrictions: Repeal of the Byrd Amendment*, 18 HARV. INT'L L.J. 713, 715 (1977).

314. *See* Lewis, *Diplomacy Not Bluster*, N.Y. Times, July 17, 1978, at 17, col. 1.

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settlement between the South African government and SWAPO.[315] The "front line" African states[316] and the Security Council have endorsed this initiative,[317] but in light of recent events it is unlikely that the South African government can be prevailed upon to make the kinds of concessions necessary to gain international acceptance for the plan as a bona fide and legitimate settlement.

The central provision of the five-power plan is that the United Nations will conduct elections in Namibia during a transitional period before independence. On September 29, 1978, the Security Council approved a plan to send 7,540 United Nations troops and 1,000 civilian officials to Namibia to supervise and control these elections.[318]

From the outset, it has been difficult to imagine how implacable adversaries such as South Africa and SWAPO, the principal parties, could be induced to compromise. A principal point of contention, which the five-power plan does not resolve, concerns future sovereignty over Walvis Bay, Namibia's only deep-water port and naval outlet.[319] It appeared that a major

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315. *See AFRICA: Peaceful Solution to the Conflict in Namibia and Southern Rhodesia;* 78 DEP'T STATE BULL. 15 (1978) (remarks of Deputy Secretary of State Warren Christopher before the Litigation Section of the American Bar Association). For a description of the negotiating process conducted by the "contact group" and the text of the United Nations Proposal for a Namibian Settlement, see 78 DEP'T STATE BULL. 50 (1978).

316. The black-ruled countries bordering on the Southern African areas still ruled by whites: Angola, Zambia, Botswana, and Mozambique.

317. Speakers at the Organization for African Unity meeting in Khartoum in the Sudan endorsed the plan in July 1978. *See* N.Y. Times, July 19, 1978, at 2, col. 3. See p. 292 *infra* (Security Council's endorsement of the plan).

318. *See* N.Y. Times, Jan. 4, 1979, at A5, col. 1.

319. Secretary of State Cyrus Vance indicated in remarks to the Security Council on July 27, 1978, that the "contact group" had left Walvis Bay out of the proposed agreement on Namibia because the views of the opposing parties "appeared to be irreconcilable." 78 DEP'T STATE BULL. 45 (1978). The "contact group" took the position that the question of sovereignty over Walvis Bay could only be resolved through negotiations between the South African government and the future government of Namibia.

Great Britain claimed Walvis Bay before Germany took over Southwest Africa as a colony in 1881. Consequently, the claim of South Africa, as Britain's successor, to Walvis Bay is much

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breakthrough had occurred, nevertheless, when Prime Minister Vorster of South Africa announced on April 25, 1978, that his government had agreed to the five-power plan.[320] After breaking off negotiations temporarily when the South Africans attacked its sanctuaries in Angola, moreover, SWAPO also agreed to the plan on July 12, 1978.[321]

Since that time, however, prospects for a peaceful resolution of the guerrilla war under the five-power plan have fluctuated. On July 27, 1978, the Security Council coupled an endorsement of the five-power plan with a call for "reintegration of Walvis Bay" into Namibia in order to promote Namibia's "territorial integrity and unity."[322] Prime Minister Vorster reacted angrily and reiterated South Africa's intention to retain sovereignty over the Bay.[323] On

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stronger than its claim to Nambia, which it received as a trust territory following Germany's defeat in World War I. Namibian nationalists believe that it is crucial that Walvis Bay be part of an independent Namibia, if the country is not to be an economic satellite of South Africa. *See* N.Y. Times, Apr. 25, 1978, at 4, col. 3.

Another dispute in the earlier stages of the negotiations, which appears to have been resolved, centered on the number of South African troops and United Nations troops that would remain in Namibia during the transitional period before independence. South Africa currently has some 15,000 to 18,000 troops in Namibia. SWAPO had demanded that this be reduced to 1,500, while the South Africans apparently wished to keep at least 4,000 troops in Namibia until independence. *See* N.Y. Times, Mar. 21, 1979, at 3, col. 2; *id.*, Dec. 28, 1978, at 3, col. 4; *id.*, Apr. 26, 1978, at 1, col. 2; *id.*, Apr. 16, 1978, § 4, at 18, col. 3.

320. *See* N.Y. Times, Apr. 26, 1978, at 1, col. 2. Eight days later, on May 3, the General Assembly voted 119-0 with 21 abstentions to recommend that the Security Council impose an oil embargo and "comprehensive economic sanctions" on South Africa. *See* N.Y. Times, May 4, 1978, at 6, col. 6.

321. *See* N.Y. Times, May 9, 1978, at 8, col. 3; *id.*, May 7, 1978, § 4, at 22, col. 1; *id.*, May 5, 1978, at 1, col. 1.

322. *See United Nations Security Council: Reports, Resolutions and Statements on the Situation in Namibia*, 17 INT'L LEGAL MATERIALS 1537 (1978); N.Y. Times, July 28, 1978, at 3, col. 1.

323. *See* N.Y. Times, July 29, 1978, at 3, col. 4; *id.*, July 26, 1978, § 2, at 8, col. 5. South Africa apparently took the position that the Security Council was reneging on its commitment to leave the status of Walvis Bay to negotiations between

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July 31, after a day-long cabinet meeting, the South African government formally withdrew approval of the five-power plan.[324]

After the talks broke down, South Africa complicated matters when it held its own elections for a Namibian assembly in early December.[323] The elections were condemned by many United Nations members and were boycotted by SWAPO. Predictably, the Democratic Turnhalle Alliance, the party supported by the South Africans, won eighty-two percent of the vote and forty-one of the fifty seats in the new Assembly.[326]

Differences between the two sides have focused in recent months on arrangements concerning SWAPO guerrillas. South Africa and the Democratic Turnhalle Alliance have demanded direct surveillance by the United Nations of SWAPO military bases in Angola and Zambia, while the United Nations plan would leave such surveillance to the Angolan and Zambian governments.[327] The five-power plan also envisions the

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323 (Continued)
a new Namibian government and South Africa. The South Africans declared that they would only discuss the status of Walvis Bay with a new Namibian government, and not with the Security Council. *See* N.Y. Times, July 18, 1978, at 12, col. 1.

324. *See* N.Y. Times, Aug. 1, 1978, at 1, col. 2. The South Africans did not, however, shut the door on a possible future compromise.

325. *See* N.Y. Times, Dec. 9, 1978, at 20, col. 4; *id.*, Dec. 7, 1978, at 2, col. 3. The Security Council condemned the election in Resolution 439, adopted on November 13, 1978, by a vote of 10 to 0, with 5 abstentions (the "contact group"). *See* 79 DEP'T STATE BULL. 52 (1979) (text of resolution). Ambassador McHenry, speaking for the "contact group" in the Security Council on December 4, 1978, also called the South African-supervised elections "illegal". *Id.* at 60.

326. *See* N.Y. Times, Dec. 21, 1978, at A10, col. 1. The Democratic Turnhalle Alliance, a coalition of whites and conservative blacks, and SWAPO are only the most prominent among a large number of political parties in Namibia. For an analysis by Tom Wicker of the tangled political situation in Namibia see N.Y. Times, Dec. 3, 1978, at 19, col. 4.

327. *See* N.Y. Times, Mar. 13, 1979, at 3, col. 4 (South Africa's criticism of Secretary General's report of February 26 as deviating from the peace plan South Africa accepted); *id.*, Mar. 19, 1979, at 3, col. 1; *id.*, Mar. 6, 1979, at A2, col. 3.

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regrouping of SWAPO guerrillas at specified places during the transitional period, which South Africa has attacked as permitting SWAPO to have military bases.[328] In the meantime, guerrilla skirmishing in Namibia has continued, and the South Africans have repeatedly invaded Angola to attack SWAPO camps. On March 28, 1979, the United Nations Security Council condemned South Africa for "premeditated, persistent and sustained armed invasions" of Angola,[329] and no compromise on how to deal with the SWAPO guerrillas is in sight.[330]

A deterioration in relations between the United States and South Africa has further diminished the likelihood of a successful compromise settlement.[331]

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328. *See* N.Y. Times, Mar. 13, 1979, at 3, col. 4.

329. *See* N.Y. Times, Mar, 29, 1979, at 2, col. 3; *id.*, Mar. 20, 1979, at 13, col. 1.

330. On May 6, 1979, a South African representative indicated that his government was willing to proceed with United Nations-supervised elections in Namibia, provided that SWAPO not be permitted to set up military bases in the interim. Whether this represented a decision by South Africa to comply with the United Nations plan was doubtful in view of the fact that the South African government had recently arrested more than 40 leaders of SWAPO, which the United Nations supports. *See* N.Y. Times, May 7, 1979, at A4, col. 3. On May 24, the General Assembly voted 96 to 16 (with 9 abstentions) to bar the South African delegation from participating in the debate on Namibia. *See* N.Y. Times, May 25, 1979, at A9, col. 2. This action made South African cooperation with the United Nations plan for Namibia even less likely.

331. On April 12, 1979, Prime Minister P.W. Botha expelled three United States Embassy personnel from the country for what he charged was their use of the Ambassador's plane for aerial espionage at sensitive installations. *See* N.Y. Times, Apr. 13, 1979, at A1, col. 6. The next day, the United States reacted by expelling two South African military attaches from the United States. *See* N.Y. Times, Apr. 14, 1979, at 4, col. 5.

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New South African Prime Minister Botha has accused American diplomat Donald McHenry, who has led the negotiating team promoting the five-power plan, of receiving confidential data on Namibia from Colin Eglin, the South African opposition leader.[332] In addition, he has accused the Carter Administration of "double-dealing" in the negotiations.[333] On May 14, Botha said that South Africa would risk international economic sanctions rather than accept the five-power plan for Namibia and described the prospects of his government's agreeing to the plan as "slim."[334]

Prospects for a compromise settlement thus appeared bleak in late June 1979. Negotiations appeared to be stalled, and a compromise may become even more difficult if South Africa holds to the September 30, 1979 deadline that it has set for Namibian independence.[335] The twists and turns

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332. *See* N.Y. Times, Apr. 13, 1979, at A4, col. 3, Botha's charges are part of a press campaign of personal attacks on McHenry by the South Africans. *See* N.Y. Times, Mar. 11, 1979, at 4, col. 1.

333. *See* N.Y. Times, Apr, 13, 1979, at A4, col. 3; *id.*, Mar. 7, 1979, at 1, col. 4; *id.*, July 29, 1978, at 3, col. 4; *id.* July 26, 1978, § 2, at 8, col. 5. Some observers view the South African accusations against McHenry and the expulsion of American personnel accused of spying as an attempt to divert attention from the Information Ministry scandal and particularly from South African government-financed attempts to manipulate the American political process by, *inter alia*, trying to buy the Washington *Star* and to bribe labor leaders and others. This scandal led to the resignation of President (former Prime Minister) Vorster on June 4, 1974. *See* N.Y. Times, June 5, 1979, at 1, col. 6. The South African attacks were also interpreted by some diplomats as an indication that South Africa did not wish to cooperate in carrying out the United Nations plan for Namibia. *See* N.Y. Times, Apr. 13, 1979, at A4, col. 3.

334. *See* N.Y. Times, May 15, 1979, p. A9, col. 1.

335. *See* N.Y. Times, Mar, 20, 1979, at 13, col. 1.

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of South African policy, moreover, have prompted wide-spread suspicion among observers at the United Nations that South Africa never intended to accept the United Nations plan, and that its periodic expressions of agreement have been calculated merely to buy time and to forestall support by the Western powers for sanctions or other more Draconian measures against South Africa.[336] It is possible, if not likely, that unless a breakthrough in negotiations occurs soon, South Africa will go ahead with a plan to grant independence to a Namibian client state on its own terms.

The foregoing account demonstrates that the Carter Administration has moved United States policy on Southern Africa much closer to that of the United Nations.[337] In particular, it has taken a

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336. *See* note 333 *supra*. See also Wicker, *Confusion in Africa*, N.Y. Times, Dec. 3, 1978, at E19, col. 5. Support for the view that South Africa is not firmly committed to cooperating with the United Nations plan for Namibia has recently been provided by a South African proposal for a new Southern African block comprising South Africa, Rhodesia, Namibia, and the black states of Botswana, Lesotho, and Swaziland, which are economically dependent on South Africa. *See* N.Y. Times, Apr. 21, 1979, at 5, col. 1.

337. Thus Ambassador Young attended and participated in the United Nations-sponsored International Conference in support of the Peoples of Zimbabwe and Namibia in Maputo, Mozambique on May 16-21, 1977, which was attended by 92 United Nations member states. The Maputo Declaration condemned South Africa and called for Namibian independence under SWAPO as the "sole and authentic Liberation Movement" of the Namibian people. *See* 77 DEP'T STATE BULL. 55, 59 (1977). In his speech at the conference, Ambassador Young also reiterated President Carter's support for Security Council Resolution 385 on Namibia. *Id.* at 58. The Maputo Declaration, *inter alia*, recognized Walvis Bay as "an integral part of Namibia" and condemned the Turnhalle tribal talks as "a South African strategem to perpetuate its ruthless colonial and racist policies and practices under false pretenses." *Id.* at 62.

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much more vigorous and active position than its predecessors in support of Namibian independence. Secretary of State Vance and Assistant Secretary of State McHenry have played key roles in the five-power initiative to mediate the Namibian dispute,[338] even where it was plain that this would antagonize the South Africans. Their efforts have won the plaudits of African leaders.[339] Because of the necessarily tentative character of diplomacy, however, these initiatives cannot be considered an "execution" of Resolutions 276 and 301, if the latter are assumed to be non-self-executing. Neither Congress nor President Carter has taken the direct and explicit action necessary officially to bind the United States under these resolutions.

If the Western powers fail to dissuade South Africa from establishing an "independent" Namibia, and a client state without international legitimacy is created, it is conceivable that the Carter Administration might act directly to execute Resolution 301.[340] If this were to occur, it would considerably facilitate efforts to enforce United Nations

338. McHenry's efforts have led to a press campaign of personal attacks on him by the South Africans. *See* p. 254 & note 332 *supra*.

339. *See* N.Y. Times, July 19, 1978, at 2, col. 3 (account of meeting of Organization of African Unity in Khartoum); Lewis, *supra* note 314.

340. Pressures by Third World countries for sanctions against South Africa have increased in recent months, as implementation of the five-power plan has been delayed because of disagreements between South Africa and the United Nations. *See* N.Y. Times, Nov. 11, 1978, at 6, col. 2. On December 21, 1978, the General Assembly voted 123-0 (with 17 abstentions, including the United States and other Western nations) to ask the Security Council to impose sanctions against South Africa for not agreeing to the United Nations plans for supervised elections in Namibia. *See* N.Y. Times, Dec. 22, 1978, at 8, col. 5. The Carter Administration, moreover, has considered the option of imposing sanctions against South Africa if it fails to comply with the United Nations plan. *See U.S. Studies Sanctions As a Path to a Free Namibia*, N.Y. Times, Nov. 29, 1978, at A7, col. 1. President Carter is reported to have warned Foreign Minister Roelof F. Botha of South Africa on December 2, 1978, that the United States would support economic sanctions against South Africa unless it cooperated with the United Nations in advancing Namibian independence. *See* N.Y. Times, Dec. 3, 1978, at 16, col. 1. If the

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resolutions on Namibia through lawsuits in American courts.

For the present, however, it is doubtful that an American court would decide that the federal government had executed Resolutions 276 and 301. It seems likely, therefore, that the success of any further litigation would require a holding that Resolutions 276 and 301 were self-executing.

Nevertheless, even if a court holds that the resolutions are self-executing and plaintiffs are successful in withstanding all other procedural and substantive challenges to their cause of action, they will still have one final obstacle to hurdle. As *Diggs v. Shultz*[341] demonstrated, the courts will not enforce United States treaty obligations if they conclude that the obligations have been abrogated or "overridden" by a subsequent inconsistent statute. The likelihood of such a conclusion will now be explored.

III. The Treaty Override Issue

A court determination that a treaty provision is self-executing does not signify its immunity from subsequent attack. Just as statutes may be repealed or superseded by subsequent legislation, treaties may be abrogated or rendered inoperative by subsequent conflicting statutes.[342]

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340 (Continued)
five-power plan continues to be stymied, international pressures on the United States and other Western powers to agree to sanctions against South Africa may become overwhelming and the Carter Administration might yield to such pressures in order to preserve the "credibility" which its African policies have gained for it with African leaders.

341. 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

342. It is true, of course, that treaty obligations can also be abrogated or nullified by a war between the signatories, although this is not inevitable. *See* Akins v. United States, 407 F. Supp. 748 (Cust. Ct. 1976); Karnuth v. United States *ex rel.* Albro, 279 U.S. 231 (1929). *But see* McCandless v. United States *ex rel.* Diabo, 25 F.2d 71 (3rd Cir. 1928); Society for the Propagation of the Gospel v. New Haven, 21 U.S. (8 Wheat.) 464, 484 (1823).

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The court in *Diggs v. Shultz*[343] found that Congress had overridden United States treaty obligations to observe the sanctions against Rhodesia by passing the Byrd Amendment.[344] Similarly, defendants in *Diggs v. Dent*[345] argued that Congress had overridden any United States treaty obligations arising under Resolutions 276[346] and 301[347] when it passed the MMPA. Because the override argument is likely to be raised in opposition to any future efforts to enforce United States treaty obligations, it is useful at this point to give a brief outline of the law of override and then to use Resolutions 276 and 301 to illustrate how the doctrine might be applied in an appropriate case.

The doctrine that valid United States treaties may be overridden is derived from Article VI of the Constitution, which declares both treaties and domestic laws enacted pursuant to the Constitution to be "the supreme Law of the Land."[348] The courts have held that treaties and statutes are of equal legal force and effect.[349] Nevertheless, conflicts have arisen between treaties and federal statutes and courts have had to decide which should prevail.[350] The Supreme Court addressed this problem in *The Head Money Cases*.[351] There the Court assumed that the act of Congress challenged by plaintiffs did conflict with American treaty obligations and it acknowledged that the treaty in question was a law. It further declared, however, that

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343. 470 F.2d 461 (D.C. Cir. 1972), *cert. denied,* 411 U.S. 931 (1973).

344. *Id.* at 465-66.

345. *See* note 2 *supra.* Neither the district court in *Dent* nor the court of appeals in Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976), ruled on this issue.

346. *See* note 266 *supra.*

347. *See* note 267 *supra.*

348. U.S. CONST. art. VI, § 2.

349. *See* Edye v. Robertson (The Head Money Cases), 112 U.S. 580 (1884).

350. *See* pp. 261-65 *infra* (discussing override issue in *Shultz* and *Dent*).

351. Edye v. Robertson, 112 U.S. 580 (1884).

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> even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.[352]

The Court reiterated this principle more recently in *Reid v. Covert:*

> This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.[353]

Frequently, of course, there is only an apparent or alleged inconsistency between a treaty and a subsequently-enacted statute. Unless it is manifest that Congress intended to abrogate the treaty when it passed the statute, courts will go to great lengths to reconcile the two: "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."[354] Furthermore, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."[355]

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352. *Id.* at 599 (footnote omitted). The court in *The Head Money Cases* went on to imply that since treaties require the approval of only the President and the Senate, while statutes also require the approval of the House of Representatives, statutes should command equal, if not superior, deference when they conflict with treaty provisions.

353. 354 U.S. 1, 18 (1956). This principle has been called the "later in time rule" and derives from the maxim "lex posterior derogat priori" (a later law takes precedence over an earlier law which is inconsistent with it). *See* Moser v. United States, 341 U.S. 41, 45 (1951).

354. Cook v. United States, 288 U.S. 102, 120 (1933).

355. Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934); *accord,* Clark v. Allen, 331 U.S. 503 (1947).

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Thus a simple conflict between the terms of a treaty and a statute does not constitute an override unless Congress, by passing the latter, had the clear and discernible purpose of nullifying the former in whole or in part. The District of Columbia District Court elaborated on this principle as follows:

> Repeals by implication are not favored. in other words, a statute will not be construed to repeal by implication an earlier enactment if it is at all possible to reconcile both. *A fortiori* this principle applies when there is an apparent inconsistency between an Act of Congress and an earlier treaty. If at all feasible the Act of Congress will be so interpreted and applied as not to affect the provisions of the treaty.[356]

The Supreme Court's decision in *Menominee Tribe v. United States*[357] exemplifies this principle of statutory construction. Congress had passed a statute ending the Menominees' tribal status, but the Court refused to hold that this impliedly abrogated the hunting and fishing rights guaranteed by treaty to the tribe because Congress had not explicitly stated that such was its intent.

Another rule of statutory construction which courts have followed in narrowing the sphere of possible treaty overrides is that expressed in *Sociedad Nacional de Marineros de Honduras v. McCulloch:*

> If at all possible, any construction of statute that would be violative of the principles of international law should be avoided. Thus, Mr. Chief Justice Marshall had occasion to observe that, 'an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains', The Charming Betsy, 2 Cranch 64, 118, 2 L.Ed. 208.[358]

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356. Sociedad Nacional de Marineros de Honduras v. McCulloch, 201 F. Supp. 82, 89 (D.D.C. 1962), *aff'd*, 372 U.S. 10 (1963); *accord*, United States v. Lee Yen Tai, 185 U.S. 213 (1902); Chew Heong v. United States, 112 U.S. 536, 549-50 (1884).

357. 391 U.S. 404, 412-13 (1968); *accord*, United States v. Consolidated Wounded Knee Cases, 389 F. Supp. 235, 238 (D. Neb. & D.S.D. 1975).

358. 201 F. Supp. 82, 89 (D.D.C. 1962), *aff'd*, 372 U.S. 10 (1963).

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Thus, explicit evidence of congressional intent to controvert United States international legal obligations is required before a statute can be held to have superseded a treaty.

Despite these demanding standards, courts have nevertheless held that certain statutes exhibited the explicit intention necessary to abrogate a treaty provision.[359] The most recent application of the override principle came in *Diggs v. Shultz*.[360] In 1966 the Security Council adopted Resolution 232,[361] which directed that all member states impose an embargo on trade with Southern Rhodesia.[362] To comply with the embargo, the President issued Executive Orders 11,322 and 11,419.[363] In 1971 Congress countered the terms of the embargo by enacting the Byrd Amendment.[364] The Byrd Amendment sought to avoid American dependence on the Soviet Union as a supplier of the vital chromium ore previously imported from Southern Rhodesia. The Amendment provided that the President could not prohibit importation of a strategic material from any non-Communist country or area unless its importation from Communist areas or countries was also prohibited.[365]

In arguing on appeal that the Byrd Amendment had not overridden United States treaty obligations under the Security Council resolution imposing sanctions on Rhodesia, appellants in *Shultz* argued that the Amendment did not by its terms require importation of chromium ore from Southern Rhodesia.[366] They pointed out that instead of allowing such importation, the President could either have banned all importation from Communist countries or declassified chromium ore as a strategic material.

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359. *See* Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934); Whitney v. Robertson, 124 U.S. 190, 194 (1888).

360. 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

361. S.C. Res. 232, 21 SCOR 7, U.N. DOC. S/INS./2 (1966).

362. See note 290 *supra* (discussing resolution).

363. Diggs v. Shultz, 470 F.2d 461, 463 (D.C. Cir. 1972) (discussing executive orders).

364. The Byrd Amendment amended the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. §§ 98-98h (1970 & Supp. V 1975). At the urging of the Carter Administration, the Byrd Amendment was repealed in March 1977. *See* note 313 *supra*.

365. Diggs v. Shultz, 470 F.2d 461, 463 (D.C. Cir. 1972) (citing Amendment).

366. *Id.* at 465-66.

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The court of appeals rejected this argument, facing squarely the fact that Congress had intentionally abrogated the international treaty obligations of the United States:

> We think that there can be no blinking the purpose and effect of the Byrd Amendment. It was to detach this country from the U.N. boycott of Southern Rhodesia *in blatant disregard of our treaty undertakings*. The legislative record shows that no member of Congress voting on the measure was under any doubt about what was involved then; and no amount of statutory interpretation now can make the Byrd Amendment other than what it was as presented to the Congress, namely, *a measure which would make--and was intended to make--the United States a certain treaty violator*. The so-called options given to the President are, in reality, not options at all. In any event, they are in neither case alternatives which are appropriately to be forced upon him by a court.[367]

The court felt that it had no alternative but to uphold the Byrd Amendment, in light of the unmistakable evidence that Congress in passing the Amendment had acted in full awareness that it was defying United States international treaty obligations under the United Nations Charter. The court's strikingly condemnatory language made it clear that it would have struck down the Amendment if it had perceived any means of avoiding the obvious congressional override which the Amendment contained. Because they held that Resolutions 276 and 301 were not self-executing, the courts in *Diggs v. Dent*[368] and *Diggs v. Richardson*[369] did not reach the question of override.

This question was briefed by the parties, however, and the override issue is likely to be raised in all cases of this sort. Accordingly, it is appropriate to analyze the putative treaty obligations arising under these resolutions as an example of how the theory of override might be applied by the court. This question will be addressed by scrutinizing the relevant legislative

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367. *Id.* at 466 (emphasis added) (footnote omitted).
368. *See* note 2 *supra*.
369. 555 F.2d 848 (D.C. Cir. 1976).

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and executive action following passage of Resolutions 276 and 301.

Statutory construction of the MMPA[370] was critical to the outcome of the Namibian fur seal skins case. Section 1371(a)(3)(A) of the Act provides that the Secretary of Commerce "is authorized and directed . . . to determine when, to what extent, if at all, and by what means, it is compatible with this chapter to waive the requirements of this section so as to allow taking, or importing of any marine mammal, or any marine mammal product."[371] The Fouke Company, the prospective importer, contended that this section had overridden any possible United States treaty obligations under the United Nations Charter and resolutions prohibiting the importation of seal skins from Namibia. This claim seemed questionable since Section 1371(a)(3)(A) merely conferred on the Secretary the discretion to grant waivers to take or import marine mammals or their products; it did not mandate the granting of such waivers. The plaintiffs in *Dent* argued forcefully that the MMPA, far from displaying any evidence of congressional intent to override United States treaty obligations with respect to Namibia or other areas, instead reflected Congress' desire to respect such international obligations.[372]

The State Department considered the question whether the MMPA overrode Resolutions 276 and 301 and apparently concluded that it did not. Deputy Secretary of State Ingersoll stated:

> The Department of State cannot support a waiver of the restriction against importing these seal skins because of their Namibian origin. The Department's position is based on the 1971 Advisory Opinion of the International Court of Justice regarding relations with South Africa on Namibian matters. The United States accepted the conclusions of the Advisory Opinion of the Court as reflecting US obligations under international law. Pertinent provisions of the Advisory

370. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 (1976).

371. *Id.* § 1371(a)(3)(A).

372. Reply Brief for Plaintiffs-Appellants at 11-12, Diggs v. Morton (*sub nom.* Diggs v. Richardson), 555 F.2d 848 (D.C. Cir. 1976), in *Dent* File, *supra* note 14.

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> Opinion, as restated in UN Security Council Resolution 301 (1971), set forth our obligation to recognize the invalidity of South Africa's acts on behalf of or concerning Namibia and to refrain from acts or dealings with South Africa implying recognition of the legality of, or lending support or assistance to, its presence and administration in Namibia. We believe that US Government approval of an application to import Namibian fur seal skins from South Africa would be contrary to our international legal obligations in that it would necessarily recognize the validity of South African management of Namibian mammal resources. We anticipate that any such action would place the US Government in a position of contravening its international legal obligations and its longstanding policy of opposing South Africa's illegal occupation of Namibia, thus adversely affecting the foreign relations of the United States and subjecting us to justifiable criticism.[373]

Ingersoll's letter made no mention of the possibility of an override of the MMPA, although he had previously raised that possibility.[374] Furthermore,

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373. Letter of October 24, 1975, to Commerce Department, *Dent* File, *supra* note 14. The following letters from State Department officials express essentially the same view: Letter of August 27, 1975, from Acting Assistant Secretary of State Thomas A. Clingan, Jr. to Deputy Assistant Secretary of Commerce Sidney R. Galler; Letter (undated) from Nathaniel Davis of the State Department to Administrative Law Judge Mast; Letter of January 16, 1976 from Deputy Secretary of State Ingersoll to Secretary of Commerce Morton. *See Dent* File, *supra* note 14,

374. Letter of August 2, 1974, to Secretary of Commerce Frederick D. Dent, *reprinted in* A. Royine, *supra* note 306, at 598-600. The letter expressed the State Department's belief that the proposed third visit of Commerce Department personnel could not "be brought into conformity with the above obligations (Resolution 301)." *Id.* at 600. Noting that under the MMPA the Secretary of Commerce was "directed" to act on applications for waivers, however, Ingersoll suggested that the Department of Commerce "may wish to consult with the Department of Justice, as to whether this recent legislative direction overrides international law considerations." *Id.*

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Acting Assistant Secretary of State Clingan stated that permitting the importation of the Namibian fur seal skins would not be consistent with either the conservation objectives of the MMPA or with general United States foreign policy.[375] It is implicit in this statement that the State Department had concluded that the threshold requirement for consideration of the override issue, an unavoidable conflict between the relevant treaty provisions and the terms of a subsequent statute, was lacking. The Commerce Department also apparently concluded that the State Department had excluded the possibility of an override. After unsuccessfully soliciting the Justice Department's opinion on the override question,[376] the new Secretary of Commerce, Elliott Richardson, eventually reversed his department's initial decision and denied the waiver to permit importation of seal skins from Namibia, in deference to the State Department's position that granting the waiver would contravene international legal obligations of the United States.[377]

If the federal courts had reached the override issue in the seal skins case, they most likely would have arrived at the same conclusion as the State Department. As noted previously, Chief Justice Marshall observed in *The Charming Betsy* that a congressional statute should, if possible, be construed so as not to violate the law of nations.[378] In the absence of any direct conflict between the provisions of the MMPA and Resolutions 276 and 301, a court would probably conclude that the exercise of the Secretary of Commerce's discretion in deciding whether to grant a waiver should be limited by the international legal obligations of the United States, especially those contained in Resolutions 276 and 301.

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375. Letter of August 27, 1975, to Deputy Assistant Secretary of Commerce Galler, *Dent* File, *supra* note 14.

376. The Commerce Department followed Ingersoll's suggestion in seeking the opinion, *see* note 374 *supra*, but the Justice Department declined to give such an opinion. (Interview with Leonard Meeker, Esq., International Project, Center for Law and Social Policy (Spring 1976).)

377. *See* 41 Fed. Reg. 10,940 (1976) (R. Schoning, Director, NMFS) (granting waiver "would not be consistent with the foreign policy of the United States").

378. 6 U.S. (2 Cranch) 64 (1804); *see* p. 260 *supra*.

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Another way in which a treaty obligation may be overridden is through presidential action. The President has the discretion to terminate or to violate treaties.[379] No President, however, has taken official action directly abrogating the treaty obligations of the United States under Resolutions 276 and 301.

This conclusion can be challenged by invoking *National Security Study Memorandum 39*,[380] which was commissioned by future Secretary of State Kissinger in April 1969 as an in-depth analysis of American interests on the Southern African subcontinent. To protect those interests, *Memorandum 39* favored its "Option 2", whose basic premise was that "the whites are here to stay and the only way that constructive change can come about is through them."[381] With respect to Namibia, the study group suggested among its "operational examples" for applying Option 2 that "[w]ithout changing the United States legal position that South African occupancy of Southwest Africa is illegal, we would play down the issue and encourage accommodation between South Africa and the United Nations."[382] While the line between its analysis of the factual situation in Southern Africa, on the one hand, and its recommendations respecting United States strategy, on the other, is unclear, *Memorandum 39*'s prediction that the black independence movements in Namibia, Rhodesia, Angola, and Mozambique were destined to remain ineffective obviously conditioned its strategic recommendations. The Study predicted that African and Asian nations would likely

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379. *See, e.g.*, Tag v. Rogers, 267 F.2d 664, 668 (D.C. Cir. 1959). Courts have not questioned the President's authority to violate a treaty obligation, although the constitutional basis for this authority is unclear. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 171 (1972). Presidents have abrogated treaties on their own initiative on repeated occasions. *See* Staff of Senate Committee on Foreign Relations, 95th Cong., 1st Sess., The Role of the Senate in Treaty Ratification, Appendix 4, Precedents for U.S. Abrogation of Treaties, at 74-76 (Comm. Print 1977) (citing examples). Senator Barry Goldwater recently brought an action challenging on constitutional grounds President Carter's termination of the defense treaty with Taiwan without prior congressional authorization. *See* Goldwater, *supra* note 38.

380. THE KISSINGER STUDY, *supra* note 310.

381. *Id.* at 105.

382. *Id.* at 107.

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increase pressure on South Africa to evacuate Namibia, but that "the South African police and military forces [would] be able to successfully counter any insurgent or dissident activity for the foreseeable future".[383]

Subsequent United States actions disclose the likelihood that Option 2 indeed became part of official United States policy. The United States opposed efforts to expel South Africa from the United Nations. Although the United States did not officially alter its arms embargo against South Africa, it increased the dollar value of its exports of civilian airplanes and helicopters. These exports enabled the South African aircraft industry to concentrate on military production. Similarly, Export-Import Bank loan guarantees to United States businesses operating in South Africa were liberalized.[384] In addition, United States investment in South Africa grew considerably, and the Treasury Department ruled that taxes paid by American businesses to South Africa in connection with Namibian operations could be credited against United States income taxes.[385] Finally, the United States has continued its refusal to join the Council for Namibia.

One might argue that these policies, taken together with *Memorandum 39*, evince the intention of the executive branch to abrogate any United States treaty obligations under Resolutions 276 and 301. It would be difficult, however, for courts to take judicial notice of or give any legal weight to the *Memorandum,* which was intended to be secret and advisory, and was couched in terms of tentative policy options. Neither Option 2 nor any of the other options, moreover, was ever publicly adopted as official policy.

A court might conceivably take note of executive action that embodied an Option 2 approach and conclude that the executive did not intend its official

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383. *Id.* at 124.

384. *See Critical Developments in Namibia, supra* note 302. It is also true, nevertheless, that since May 1970 the United States has officially discouraged American investment in Namibia and has not made available Export-Import Bank credit guarantees for trade with Namibia.

385. *Id.* at 65, 119.

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statements of support for the United Nations position on Namibia to be taken literally. Court action of this type seems unlikely, however. Although federal courts have often refused to enforce the letter of United States treaties, this has been in cases where public, explicit action by the executive or by Congress had overridden or superseded the treaty obligation in question. In no case was refusal to honor a treaty clause based on a process by which the court inferred from a pattern of executive actions that actual American policy was contrary to that officially enunciated. Instead, official declarations of policy by authorized government representatives have been controlling, rather than any indirect inferences from activities which might be interpreted to yield a contrary result.

In any event, the official record is somewhat mixed. It is true that the United States has opposed efforts in the United Nations to penalize South Africa for its refusal to give independence to Namibia.[386] Official executive policy on Namibia, nevertheless, has always reflected United States support for Namibian self-determination. In recent years, the United States has supported Security Council Resolutions 366 of December 17, 1974, and 385 of January 30, 1976, which reaffirmed the terms of previous United Nations resolutions on the subject.[387]

Clearly, no evidence of an intention to override any United States obligations under Resolutions 276 and 301 can be found in the policies of the Carter Administration.[388] The policies of the State Department

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386. *See* note 311 *supra* (United Nations resolutions on South Africa opposed by the United States during the Nixon and Ford Administrations).

387. *See* U.N. DOC. S/PV. 1812 (1974), at 77-81; U.N. DOC. S/RES.385 (1976). *See also* 74 DEP'T STATE BULL. 243 (1976) (statement by Ambassador Moynihan in the Security Council regarding Namibia).

388. Indeed, in the fall of 1977, the Carter Administration took a dramatic step to bring United States policy closer to the prevailing United Nations position by reversing the United States' earlier stand and endorsing the imposition of a mandatory arms embargo on South Africa. *See* p. 249 *supra*.

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in the Ford and Nixon Administrations were somewhat more ambivalent. The principal reason for the State Department's hesitancy in supporting United Nations resolutions on Namibia during the Ford and Nixon administrations, however, was apparently a reluctance to endorce mandatory Chapter VII sanctions rather than lack of support for Namibian independence. Much more unqualified opposition to the United Nations' position on Namibia as reflected in Resolutions 276 and 301 would be necessary to find an override of these resolutions by the United States.

A final argument in favor of an override in the seal skins case could be made by asserting that the Commerce Department had overridden Resolutions 276 and 301 when it initially granted the waiver to permit importation. It is not clear, however, that lower government officials have the power or authority to override treaty obligations. While the courts will not challenge the actions of a President in violating or terminating a United States treaty, the actions of a cabinet official are not entitled to the same deference.[389]

There is no indication, moreover, that the initial grant of the waiver by the Commerce Department represented its considered policy decision to violate the international obligations imposed by Resolution 301. Indeed, Secretary of Commerce Richardson's later reversal of the waiver testifies that this was not the case. Richardson based his decision on international law, but he did not present it as a reversal of a previous international law conclusion of the Commerce Department. If the initial grant of the waiver had effectively overridden United States international legal obligations under Resolutions 276 and 301, it would be anomalous for the Secretary of Commerce to overturn that decision later in order to comply with applicable United States international obligations.

In summary, no colorable argument can be made that United States treaty obligations under Resolutions 276 and 301 have been overridden by the legislative or executive branch. The Byrd Amendment, now repealed, is likely to remain the unique instance in which the United States formally and explicitly

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389. *See, e.g.*, Cook v. United States, 288 U.S. 102 (1933); Chew Heong v. United States, 112 U.S. 536 (1884); 24 U. KAN. L. REV. 395, 404-05 (1976).

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repudiated binding United Nations treaty obligations.

Conclusion

Plaintiffs seeking to enforce United Nations resolutions on Namibia in American courts face an arduous task. They will confront a series of obstacles, and the special vulnerability of public interest litigation is likely to compound the substantive legal problems of their lawsuit.

We have divided the issues in such litigation into three subject areas: (1) Are there any jurisdictional or other threshold barriers in American courts to the assertion of claims based on United Nations resolutions? (2) Are particular United Nations resolutions binding as a matter of United States domestic law? (3) Have particular United Nations resolutions nevertheless been effectively nullified as a matter of United States domestic law by subsequent and inconsistent congressional or presidential actions?[390] The last of these is not likely to pose a problem for potential litigants: there have been no United States legislative overrides of United Nations measures since the repeal of the Byrd Amendment. It appears unlikely that Congress in the future will take this course in abrogating United States treaty obligations under the United Nations Charter. Consequently, the remaining two subject areas, the jurisdictional or threshold hurdles and the substantive domestic law issues, would no doubt comprise most of the issues litigated.

There are two major threshold hurdles for plaintiffs to cross: the political question doctrine and standing to sue. Both of these are essentially prudential and discretionary principles, whose application to uncertain future controversies is hard to predict. The political question doctrine should be the easier barrier to surmount. Neither a case involving Resolution 301 on Namibia nor a future lawsuit to enforce other Security Council resolutions

390. *See* pp. 164-65 *supra*.

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is likely to involve issues as sensitive as those which have militated in favor of judicial abstention in the past. It is significant in this regard that the court of appeals in *Diggs v. Richardson*[391] sidestepped the district court's political question holding and went on to adjudicate the substantive legal issues. There is no compelling reason why a future court presented with an attempt to invoke a Security Council resolution should not also clear the political question hurdle and reach the substantive issues.

Although the holdings on standing of *Diggs v. Shultz*[392] and *Diggs v. Dent*[393] remain undisturbed and should afford plaintiffs considerable support, standing represents a formidable obstacle. The vulnerability of an action to enforce Security Council resolutions will increase if plaintiffs are only "public interest" surrogates for Namibian interests. Arguments for permitting the assertion of third party rights by such plaintiffs, however, are particularly persuasive in light of the difficulty Namibians or other such nationalities would have in suing in American courts.

·ecent Supreme Court cases restricting the standing of public interest litigants seem adverse to such actions, although none of these cases involved a treaty claim and there are no important American precedents regarding standing in the area of international law. While generalizations about standing are notoriously risky and it is hard to predict the application of the amorphous standing rules to future hypothetical cases, plaintiffs' chances of prevailing on this issue will be enhanced if some of the plaintiffs are natives of the territory or country in controversy with a direct and tangible grievance, like Theo-Ben Gurirab in *Dent*.

Substantive domestic law questions constitute the most important group of issues that plaintiffs must face. There is little question that Security Council resolutions impose obligations upon United Nations members as a matter of international law. The United Nations Charter is itself a treaty

391. 555 F.2d 848 (D.C. Cir. 1976).

392. 470 F.2d 461 (D.C. Cir. 1972), *cert. denied,* 411 U.S. 931 (1973).

393. *See* note 2 *supra.*

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ratified by the United States and by other member states. The Charter makes it plain that the Security Council has power under Article 25 to bind member states to comply with its resolutions when, under Chapter VII, a threat to world peace exists.

Security Council Resolutions 276 and 301 concerning Namibia, however, were passed pursuant to the Security Council's authority to mediate and arbitrate international disputes under Chapter VI. Scholars disagree on whether Article 25's power to compel compliance extends to Chapter VI resolutions. In any event, the International Court of Justice has given an affirmative answer to this question. Once the United States ratifies a Security Council resolution, as it did in the case of Resolution 301, it seems anomalous to attempt to vitiate the ratification by adopting the position that such resolutions do not bind members--a position rejected, moreover, by the International Court of Justice.

Whether Security Council resolutions are binding as a matter of domestic law is a separate inquiry with several parts. The principal question is whether the claimed treaty provision is self-executing, or, if it is not, whether it has nevertheless been executed by the federal government. It is difficult to generalize about standards in this area: whether a treaty is self-executing must be determined by intensive scrutiny of its individual provisions and subject matter. Courts have held some Charter sections to be self-executing and others to be non-self-executing. While the court of appeals in *Richardson* held limited provisions of Resolution 301 to be non-self-executing, future courts might decide differently with respect to this or other resolutions. Demonstrating that Resolution 301 or other Security Council resolutions in future litigation are self-executing, however, is no doubt the most difficult and important task that plaintiffs will face.

Even if it is held that Resolution 301 or other Security Council resolutions are non-self-executing, plaintiffs may still prevail if they can show that the resolution in question has been executed by either Congress or the executive. A review of the Southern Africa policy of the last three Administrations reveals that it has varied from the Realpolitik of Henry Kissinger and *National Security Study*

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Memorandum 39 in the early 1970's to the aggressively pro-black African position of United Nations Ambassador Young at present. The federal government's record on Namibia, however, discloses no direct and clear action either to execute Resolution 301 (assuming that it is non-self-executing) or to abrogate it (assuming that it either is self-executing or has been executed). It is not inconceivable, of course, that if South Africa maintains its current hard-line stance against concessions on Namibia, international pressures might grow strong enough to persuade the Carter Administration to impose sanctions on South Africa or take other action to execute Resolution 301.

In summary, litigation in American courts to enforce Security Council Resolution 301 or other Security Council resolutions is fraught with legal difficulties, both jurisdictional and substantive. It is difficult to predict the success of future litigation involving different resolutions, countries, and issues. The Namibian action, in any case, has served a real purpose in international law. Although it may have failed to achieve directly its principal international law objectives, the case won a substantial victory in the administrative decision to bar importation of seal skins from Namibia. Another of the accomplishments of this litigation is intangible but nonetheless real; it helped focus needed attention on, and may thereby have contributed to the eventual solution of, one of the most intractable international law controversies of recent years.

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